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UNITED STATES OF AMERICA, *Respondent*.

UPON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The District Court for the Western District of Washington, Northern Division, did not write an opinion and its decision is unreported (R. 43, 63).[1] The Court of Appeals' opinion (R. 79-89) is reported in 225 F.2d 642.

JURISDICTION

The Court of Appeals' judgment was entered September 1, 1955 (R. 78-90). Petition for rehearing filed September 30, 1955, was denied October 14, 1955 (R. 90). A Second Petition for Rehearing (R. 92-124) was filed December 27, 1955, pursuant to leave granted (R. 91) and was denied February 17, 1956 (R. 125).

On January 10, 1956, Mr. Justice Douglas extended to March 12, 1956, the time for filing Petition for Certiorari (R. 125). Petition for Writ of Certiorari was

[1] Portions of the District Court's remarks selected by stipulation of counsel appear in transcript of record (R. 33-66).

filed in this Court on March 9, 1956, and was granted April 23, 1956 (R. 126).

Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is the United States liable under the Tort Claims Act for negligence of its employees fighting fire on cut-over lands adjacent to forested lands, or is it immune from such liability because of the "no analogous liability" theory of *Feres v. United States,*[2] and the "public fireman immunity" theory stated in *Dalehite v. United States;*[3] and to what extent has the *Dalehite*

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[2] 340 U.S. 135 (1950).

[3] *Dalehite v. United States,* 346 U.S. 15 at 43-44 (1953).

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

" ' . . . the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States,* 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres.* We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon,* 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342. To impose liability for the

statement been limited by *Indian Towing Company, Inc., v. United States*?[4]

2. Depending upon the extent by which the "no analogous liability" theory of *Feres* and the "public immunity" pronouncement of *Dalehite* have been limited by *Indian Towing,* primary or collateral questions include:

(a) Should not the "no analogous liability" theory be limited to analogous liability of private individuals except where the negligent act or omission has not been, at one time or another, or could not conceivably be, privately performed?

(b) Is there not parallel or analogous liability of private individuals, of municipal corporations, and even of the United States, each of which will support petitioner's claim?

(c) Are the reasons why and the circumstances under which municipal corporations are immune from liability for negligence of firemen, present in this case?

(d) If there is public fireman immunity, do not equally well established exceptions to that immunity apply?

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[4] *Indian Towing Company, Inc., v. United States,* 350 U.S. 61 (1955), holds that: (a) Municipal immunities do not apply to immunize the Government; (b) the Government may be liable for its negligence in performing even public or "uniquely governmental" functions; (c) Government liability is not predicated on the presence or absence of *identical* private activity or on whether a private party is likely to be performing such activity; (d) when Government undertakes services, inducing reliance, it will be liable if it fails to perform prudently as a volunteer; and (e) the Government should not be immunized from liability by technical, legalistic obscurities premised on fortuitous circumstances.

---

alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

(e) Does the "public firemen" status of employees immunize the Government in all fire fighting situations and, if not, is this not a case where the immunity should *not* apply?

(f) Are not the essential facts of *Dalehite* so different from those of the case at bar as to make *Dalehite* inapplicable as precedental authority?

3. Can the United States be liable for its negligence as a volunteer? The Court of Appeals decided not, in conflict with this Court's decision in *Indian Towing* and with the Fifth Circuit Court of Appeals' decision in *United States v. Lawter,* 219 F.2d 559 (5th Cir., 1955).

4. Is not the United States liable under the Tort Claims Act under circumstances where a private person would be liable to claimant in accordance with the law of the State of Washington:

(a) Because of negligent failure to conform to standards set by Washington statutes relating to fire prevention and fire suppression on lands in forest areas;

(b) Under common law as a landowner, as a volunteer and as a contractor with a third party for negligently failing to prevent and extinguish fire in forest areas?

5. Do Washington statutes Am. Rem. Supp. §5807; RCW 76.04.370 and Rem. Rev. Stat. §5818; RCW 76.04.450, Appendix B, *infra,* pp. 110, 112, impose liability without fault and are they pertinent in determining Government negligence and liability for failing to conform thereto? The Court of Appeals decided the statutes do impose liability without fault and are not

applicable to the Government, in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Praylou,* 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954).

6. Has the Court of Appeals, on a motion to dismiss for failure to state a claim, so construed the amended complaint as to do substantial justice, or has it so grossly misconstrued the amended complaint as to call for an exercise of this Court's power of supervision? Two important matters are involved: (a) An allegation that "defendant owned, had control of and free and unrestricted access to" lands, including the right-of-way thereon, was stated by the Court to mean that the defendant had only "a right to enter and inspect the right-of-way" (R. 85) (b) A fire which started August 6 burned continuously until after September 20. By August 11 it was contained and controlled in smoldering form within a 1600-acre area where it smoldered until September 20 when it broke out into the adjoining forests. The Court of Appeals said, " * * * it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury * * * " (R. 81). That statement is made despite allegations in the amended complaint describing negligent acts and omissions of Government employees prior to the outbreak of the fire and during the early stages of the fire as well as during the forty-day period of the smoldering fire, and the express allegation (R. 29) that each and every one of the negligent acts and omissions described proximately caused and contributed to the fire and the damage suffered by plaintiff. Vital questions as to relationships and duties of the parties and of proximate cause hinge

on the proper and fair construction of the complaint. A corollary question is whether negligence of Forest Service employees as a proximate cause of a fire is nullified as a proximate cause solely by the same employees donning firemen's hats and thereafter proceeding negligently in the immune status of "public firemen."

STATUTES INVOLVED

This case does not involve any constitutional provisions, treaties, ordinances, or regulations.

The following federal statutes, all of which are set out verbatim in Appendix A hereto, *infra,* pp. 91-96, are involved:

62 Stat. 933; as amended: 63 Stat. 62, 101	28 U.S.C. §1346
62 Stat. 982; as amended: 63 Stat. 106	28 U.S.C. §2671
62 Stat. 983;	28 U.S.C. §2674
62 Stat. 984; as amended: 63 Stat. 444 64 Stat. 1038, 1043	28 U.S.C. §2680
30 Stat. 35; as amended: 33 Stat. 628	16 U.S.C. §551
43 Stat. 653; as amended: 43 Stat. 1127 44 Stat. 242 61 Stat. 449	16 U.S.C. §565

The following Washington State statutes, all of which are set out verbatim in Appendix B, *infra*, pp. 97-113, are involved:

Rem. Rev. Stat.	§950;	RCW 4.08.110
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	§2523;	RCW 76.04.220
	§5647;	RCW 4.24.040
	§5648;	050
	§5649;	060
	§5784;	RCW 76.04.050
	§5789;	180
Am. Rem. Supp. 1945	§5792-1;	230
Am. Rem. Supp. 1941,	§5794 (part);	250
	(part);	260
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Rem. Rev. Stat.	§5795;	280
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	§5803;	340
	§5804;	350
Am. Rem. Supp. 1945,	§5806;	380
Am. Rem. Supp.	§5807;	370
Rem. Rev. Stat.	§5808;	400
Rem. Supp. 1949,	§5817-1;	410
Rem. Rev. Stat.	§5818;	450

The Federal Tort Claims Act, 62 Stat. 983, 28 U.S.C., §2674 *et seq.*, states that:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

62 Stat. 933, as amended 63 Stat. 62, 101; 28 U.S.C. §1346(b) gives District Courts:

> " * * * exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, * * * caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

This is a suit under the Tort Claims Act where damages occurred on and after September 20, 1951, from fire which started August 6th and burned continuously until after September 20. The Respondent's motion to dismiss the amended complaint for failure to state a claim on which relief can be granted, was granted by the District Court (R. 66-67) and affirmed by the Court of Appeals (R. 90).

The District Court's jurisdiction was conferred by 62 Stat. 933, as amended 63 Stat. 62. 101; 28 U.S.C. §1346(b) and 62 Stat. 982-84, as amended 63 Stat. 106, 444 and 64 Stat. 1038, 1043; 28 U.S.C. §§2671-2680, Appendix A, *infra,* pp. 91-94, the negligent acts and omissions complained of having occurred and the damage having been sustained in the Western District of Washington, Northern Division (R. 3).

The amended complaint has been carefully drawn and worded and we urge full reading thereof (R. 3-33). It alleges, among other things, the following:

On the Olympic Peninsula in Washington the United States owns timberlands, some of which are cutover, administered by the Forest Service of the Department of Agriculture for timber sales to private industry. Privately owned timber and timberlands are adjacent to and intermingled with Government lands (R. 4-6). On and for many years prior to August 6, 1951, the Government owned certain lands across which was the railroad right of way of the Port Angeles Western Railroad, and the immediately adjacent lands. The Government "owned, had control of and free and unrestricted access to" said right of way and adjacent lands (R. 11). On the right of way and adjacent lands of the Government were accumulations of logging and clearing debris, rotten ties, dry grasses, brush and trees which constituted a fire hazard under the statutes of Washington, all of which the Forest Service employees knew. The railroad company operated defective and deficient equipment over the right of way and failed to have its passing trains followed by a speeder or other equipment to watch for fires that might be caused by the train, contrary to the requirements of Washington statutes, all of which was known to the Forest Service employees. The Forest Service employees had the right and duty to abate or cause to be abated the aforesaid fire hazardous conditions and practices (R. 11-13).

About noon, August 6, 1951, approximately six spot fires caused by a passing train started on and in the vicinity of the right of way on Government lands. Five of them were soon extinguished and the sixth could have been but wasn't. The fire continued to spread and by nightfall covered about sixty acres, where it was con-

fined and controlled. It could have been extinguished but wasn't. About 2:30 p.m. on August 7th, the fire broke away and spread over a 1600-acre area of logged-off lands. The fire in the 1600-acre area was contained and controlled by August 11th (R. 12-15). It remained in smoldering form until the early hours of September 20th, when sparks from it blew into the nearby slash and timber and a tremendous forest fire resulted which burned an area ranging up to five miles in a north-south direction and twenty miles in an east-west direction (R. 15, 18-25). That fire caused the damage complained of (R. 29).

The Forest Service District Ranger was immediately informed of the outbreak of the fire on August 6th, and the District Ranger and his subordinates immediately assumed, took over and exercised exclusive supervision, direction and control of all activities in connection with the fighting and suppression of the fires and continued to do so at all times thereafter. Petitioner, in common with other timber operators in the area, knew of those facts and relied upon the District Ranger and his subordinates to carry on said activities at all times (R. 13-14).

Fifteen negligent acts and omissions proximately causing the damage are alleged (R. 26-29). Without hereby waiving any of the claims of negligence or intending to limit them, the negligence may generally be classified as follows: Permitting and failing to abate the long continued existence of fire hazardous conditions on the Government's lands, contrary to the law and statutes of the State of Washington (R. 11-12, 7-8); permitting and failing to abate the operation of defective and deficient equipment on those lands by the Port An-

geles Western Railroad, and permitting and failing to abate improper practices by the railroad, all of which constituted fire hazards and were contrary to law and statute (R. 11-13, 7-8); failing to control and completely extinguish the fire in each of its three early stages, that is, at the spot fire stage, the 60-acre stage, and the 1600-acre stage (R. 15, 17-26); failing to use sufficient men and equipment and adequate methods to control, hunt out and extinguish all fire, although sufficient men, equipment and water were at all times available and there was ample time in which to perform the work (R. 18); and lastly, in continuing negligent and inadequate practices in the face of weather conditions, weather forecasts, fuel conditions, topography, and the tremendous value of property which was in jeopardy because of the smoldering fire (R. 10, 20-21, 23).

The Government's land and timber need looking after just as do the land and timber owned by private parties. Like private property owners, the Government employs caretakers whose duties are many and varied. As caretakers, the District Ranger and his crew had the duty to see that the Government's lands were maintained and kept in the manner required of all such landowners by the law and the statutes of the State of Washington; to patrol and inspect all lands in the area; to discover, eliminate and abate conditions thereon which constituted fire hazards; to watch for the outbreak of fire, and when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same; and to supervise, direct and control activities in fighting and suppressing such fires.

They had the authority and power to hire men and equipment to fight fires, and to summon and impress help to prevent, suppress and control fires (R. 8-10, 16-18).

A large area of lands, including those mentioned in the complaint, had, by contract between the Forest Service and the State of Washington, been established as a Forest Service Protective Area. By said contract the Forest Service agreed to protect said area against fire and to take immediate, vigorous action to control all fires originating on or threatening such lands. The contract also provided, among other things, as follows (R. 6-7):

> "9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of any forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federal laws, or under general law."

Protection and preservation of the forests is a matter of first concern, both to the residents of the area and to the timber and mill operators. As a consequence, men willingly and voluntarily respond to calls for assistance in fighting fires, and owners of equipment willingly and voluntarily furnish their equipment. A Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest, and was to be

followed and employed by the District Ranger and his subordinates. That Plan was in effect at all times involved. The Plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Area, and the method of getting such men and equipment to the scene of the fire. Additional men and equipment were also available. The Plan contemplated that the District Ranger and his subordinates would call upon and use all men and equipment necessary to suppress and extinguish fires, and it was one of the District Ranger's duties to do so. The Forest Service did not own, maintain or operate a fire department or fire fighting organization as such, but, just as other owners of timber and timberlands in the area, it had some men and equipment available to fight fires, and knew where additional men and equipment could readily and quickly be obtained (R. 16-18).

There are two rivers in and adjacent to the 1600-acre area which could provide more than enough water to supply all conceivable requirements in fighting the fire. There were usable and safe roads both within the 1600-acre area and the lands adjacent thereto providing access to all parts of it. The nearby railroad could also be utilized (R. 19-20).

Fires smolder and burn in debris, logs and stumps for long periods with no visible flame. That was the condition which continued in the 1600-acre area from August 11th to September 20th, when the fire broke away (R. 21-22). The Forest Service employees knew this. They could have combed the area, and especially the key points, with men and equipment to search out

and extinguish all such smoldering fire (R. 6-9, 21-23). Notwithstanding this, notwithstanding the extremely dry and hazardous conditions which had prevailed for four months prior to August and during all times mentioned in the amended complaint, and notwithstanding the extensive stands of timber which were imperiled, the Forest Service did practically nothing for the forty days from August 11th to September 20th (R. 10, 4-5, 21).

Northeasterly winds are not uncommon in the area. They are dry winds, decreasing the humidity and increasing the fire hazard. Such winds, sweeping over the 1600-acre area, would naturally carry sparks westerly and southerly into the big timber. On September 13th, such a wind blew sparks out of smoldering debris near the westerly boundary of the 1600-acre area, causing a fire close by. That incident occurred when men were present, and as a consequence the fire was extinguished (R. 20-23).

With full knowledge of all the foregoing, the District Ranger, Sanford Floe, and his assistants, employed only a few men and a few items of equipment and tools during the forty days, keeping the area mostly on a patrol basis during the day and maintaining no men on the job and no lookouts after the normal working day (R. 21-25).

In spite of weather forecasts of northeasterly winds and decreasing humidity, the same indifferent practice was followed by the Forest Service employees on September 19th and 20th. The anticipated wind blew sparks from the 1600-acre area into the adjoining slash and timber, and the big fire was under way (R. 20-26).

Petitioner's timber, lands, railroad, bridges, telephone system and other property were damaged or rendered useless by the fire and Petitioner incurred expenses in connection therewith, for which recovery is sought in the amount of $1,130,295.52 (R. 29-33).

SUMMARY OF ARGUMENT

I.

None of the statutory exceptions to the waiver of immunity, as set forth in 28 U.S.C., §2680, is involved. All acts and omissions complained of were at the operational level.

The courts below said that under *Dalehite v. United States,* the Government cannot be held liable for the negligence of Forest Service employees in fighting a fire in a forest area because in so acting the Forest Service employees are public firemen. The language in the *Dalehite* case is: "Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." That language in turn is premised upon language of *Feres v. United States,* which is: "We find no parallel liability before, and we think no new one has been created by, this act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."

In ascertaining to what or to whose liability a parallel or analogy must be found in order to make the United States liable under the Federal Tort Claims Act, we cannot look for prior analogous liabilities of

the United States or of the several states because those are sovereigns and they have had no prior tort liabilities except such as they may have expressly conceded by statute. We cannot look for prior analogous liabilities of municipal corporations because of the reasons stated in *Indian Towing Company v. United States.* One must therefore look for parallel or analogous liability of private individuals, which is the test expressly provided in the Tort Claims Act which states that the United States will be liable "in the same manner and to the same extent as a private individual under like circumstances."

Petitioner's case is supported by parallel liability of private individuals; of private fire-fighting companies; of municipal corporations, both as an actor and as a landowner on whose land fire has originated or from which it spread; and of the United States itself in the performance of equally public functions for the general welfare, *e.g.,* negligent acts of soldiers, military airplane pilots, Coast Guard rescue crews, airport control tower operators.

Immunity from liability for negligence of firemen is a doctrine peculiar to municipal corporation law. The reasons why and circumstances under which municipal corporations have been held immune are not present in the case at bar for the following reasons:

(a) The Forest Service employees were not public firemen because they were primarily caretakers of Government timberlands and fire fighting was only one of many of their duties.

(b) The employees were caring for property which

the Government owned in a proprietary capacity and their services were for the direct and special benefit of the Government.

(c) The employees were engaged to look after the Government timber alone and not the property of other parties; fighting fire on other's lands was for the end purpose of protecting Government property. The Secretary of Agriculture was not authorized to provide fire-fighting service for the public at large but only to lend assistance and cooperation in order to protect Government timber.

II.

The Government is liable as a volunteer, it having assumed and undertaken exclusive supervision and control of fighting the fire involved and induced reliance thereon by petitioner. Having done so, it was bound to act with due care and is liable for its negligence. The court below ruled that under *Dalehite v. United States,* the Government cannot be said to assume the common law obligation of a volunteer. That ruling is in conflict with the Supreme Court decision in *Indian Towing Company v. United States* and with the decision of the Fifth Circuit Court of Appeals in *United States v. Lawter,* both of which hold the United States liable as a volunteer.

III.

The United States is liable in the case at bar because an individual under like circumstances would be liable:

(a) Under the Washington statues; and

(b) Under Washington common law as a landowner,

as a volunteer, and for negligence in performing a contract.

Washington forestry statutes make *both* the owner of the land *and* the party responsible for its condition, obligated to eliminate fire-hazardous conditions and practices on lands and to fight and pursue fires originating thereon or spreading therefrom. The United States owned, had control of and free and unrestricted access to lands upon which this fire started. The fire started when defective railroad equipment was permitted to operate over the Government lands and threw sparks into the inflammable materials which the Government, contrary to Washington statutes, had permitted to remain on those lands. An individual would be negligent in permitting those fire-hazardous conditions and practices on his lands, and liable for the consequences of that negligence. A private individual would have the duty, under Washington statutes, to pursue and use all prudent means to extinguish the fire, failure to do which would constitute negligence. The Government, having the same liabilities as an individual, is also negligent and liable. The Government could have *prevented* the fire but negligently failed to do so. The Government could have extinguished the fire but negligently failed to do so at each of three different stages: the spot-fire stage, the 60-acre stage to which it spread during the first few hours, and during the forty-day period in which the fire was contained and controlled in smoldering form on the 1,600-acre area. Ample men, equipment and water were available but not used.

The common law, as interpreted by numerous Wash-

ington decisions, is substantially the same as statutory law with respect to the duty to guard against, fight and pursue fire originating on one's lands, and an individual would have been liable under the circumstances of the case at bar.

An individual, acting as a volunteer and undertaking exclusive supervision and control of the fire-fighting activities and inducing reliance on such undertaking, would be required to use due care and would be liable for failure to do so. Under the Tort Claims Act, the Government is likewise liable.

The Government was party to a contract with the State of Washington, in which the Government agreed to supervise fire fighting in the general area in which the fire occurred. Even though petitioner was not a party to that contract, it was entitled to rely upon the Government's performance of those contractual obligations in a prudent manner. Failure of the Government so to perform the same constituted negligence. An individual under like circumstances would be liable and therefore the Government is liable.

IV.

Two Washington statutes, Rem. Rev. Statutes §§5807 and 5818 (RCW §§76.04.370 and 76.04.450), set standards of care for conditions of and practices on lands in forest areas. Petitioner contends that failure to conform to those standards is negligence. Of those statutes the Court of Appeals said that they purport to impose liability without fault and that the *Dalehite* case does not waive immunity of the United States in such actions. That holding is in conflict with the decision of

the Fourth Circuit Court of Appeals in *United States v. Praylou,* in which case this court denied Certiorari. The *Praylou* case holds the Government liable under the Tort Claims Act by reason of a South Carolina statute imposing absolute liability for injuries caused by a falling aircraft. The Washington statutes do not impose absolute liability under the ruling of the Washington Supreme Court in *State of Washington v. Canyon Lumber Corporation.* But whether they do or do not impose absolute liability, they are still pertinent and applicable as establishing standards to which lands in forest areas must be maintained for the safety and welfare of persons and property in the state. If private individuals fail to conform to those standards, they are negligent; and negligence of the United States under the Tort Claims Act must be measured by the same standards.

V.

The fire started on lands through which is the railroad right of way of Port Angeles Western Railroad. The amended complaint alleges that the Government "owned, had control of and free and unrestricted access to" the right of way and adjoining lands (R. 11). Also the complaint alleges that the fire started "on and in the vicinity of the right of way" (R. 12). The court below characterizes the Government's interest in these lands, including the right of way, as "a right to enter and inspect the right of way."

In Washington special responsibilities attach to ownership and control of land. The extent of the Government's ownership and its right of control of and re-

sponsibility for conditions on the land where the fire started, including the right of way over which the defective railroad equipment was operated, are matters of primary importance. If one owning or having control of the land has a right and duty to abate fire-hazardous conditions and practices thereon and to fight and pursue fire originating thereon, it is essential to determine the fact of ownership and control. The language of the complaint is broad and under it petitioner would be entitled, and is prepared, to prove that such right of way as existed was granted years ago by a private party, the then owner of the right-of-way area and adjoining lands, to another private party; that the United States thereafter acquired the servient estate and adjoining lands in an exchange transaction with the private owner, and that still other agreements and relationships between the Government and the railroad gave the Government access and effective control.

Rules of Civil Procedure, Rule 8(f), require that all pleadings shall be so construed as to do substantial justice. On a motion to dismiss which challenges the sufficiency of an amended complaint to state a claim upon which relief can be granted, the amended complaint must be construed in a light most favorable to plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.

The Court of Appeals has so far departed from these rules of construction and has so misconstrued the clear allegations of the amended complaint as to deprive petitioner of its day in court and to call for an exercise of this court's powers of supervision.

VI.

The fire started August 6, 1951, and burned continuously until after September 20. By August 11, it was contained and controlled in smoldering form within a 1,600-acre area. The Court of Appeals said: "It was this recurrence of fire on the 1,600-acre tract which was the sole proximate cause of the injury." The amended complaint alleges acts of negligence of the Government before the fire started, at the spot-fire stage, at the 60-acre stage. and at the 1,600-acre stage. It further alleges that each of these acts of negligence was a direct and proximate cause of the injuries sustained. The complaint should be construed so as to do substantial justice, and in a light most favorable to plaintiff. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then say: "As a result plaintiff [was injured]." Under numerous decisions, proximate cause is a question of fact to be determined by the trier of the facts and not by the court as a matter of law. Again we believe the Court of Appeals has so grossly misconstrued the pleading and departed from established rules of construction as to require the exercise of this court's powers of supervision.

ARGUMENT

PART ONE

Questions 1 and 2

1.00 There Is Analogous Liability for Petitioner's Claim. The "Public Fireman Immunity" Theory Is Inapplicable.

The Court of Appeals said that the activities of the Forest Service here involved were a "*public* function"; that the Forest Rangers acted in the capacity of "*public* firemen" and "*public* servants"; and that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act. That holding was explicitly based on *Dalehite v. United States,* 346 U.S. 15 (1953).

That holding was in error and it presents Questions 1 and 2 in this appeal stated *supra,* pp. 2-3.

In effect, the Court below decided this case as if the Federal Tort Claims Act had never been enacted, for its decision was in spite of the Act—not because of anything stated in it. ***The "discretionary function" exception contained in 62 Stat. 984, 28 U.S.C. §2680 (a), is not involved here because all acts and omissions complained of were at the operational level. Neither that exception nor any other part of §2680 is applicable or contended for by Government counsel nor pointed to by either of the courts below as a basis for their holdings.***

Since § 2680 is not applicable, Government counsel argue, and the Court below held, that petitioner's claim is barred under the "public firemen immunity" holding of *Dalehite v. United States,* which holding, in turn, is based upon the "no analogous or parallel liability"

statement of *Feres v. United States,* 340 U.S. 135 (1950).

The "no analogous liability" theory is not applicable to the case at bar because there is analogous liability of private individuals, of municipal corporations, and even of the United States to support petitioner's claim. Analogous liability of private individuals is all that is necessary.

The "public firemen immunity" theory is not applicable because:

(a) That theory is peculiar to municipal corporation law, which law is specifically renounced by *Indian Towing Company, Inc., v. United States,* 350 U.S. 61 (1955).

(b) The Forest Service employees were not public firemen.

(c) The reasons why and circumstances under which a municipal corporation is immune from liability do not exist in the case at bar.

(d) The "public" character of the Forest Service employees' functions and activities is immaterial in the determination of Federal tort liability.

Discussion of analogous liability and the applicability of the "public firemen immunity" theory follows.

1.01 Analysis of "No Analogous Liability" Theory.

Before pointing specifically to the analogous liability which supports the petitioner's claim, a brief analysis of the "no analogous liability" theory is in order.

In the *Indian Towing* case this Court pointed out

that *Feres v. United States* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U.S. 146. Since the maintenance and operation of a national army is the exclusive right of the sovereign, and because servicemen, all being in the employ of the same master and engaged in extra-hazardous occupation, no member of the Armed Services on active duty may recover from the Government for negligence of others in the Armed Services on active duty. Under our Constitution no private person could raise and maintain an army, and hence no private person could be under like circumstances. Hence, the language of the *Feres* case is not inappropriate as applied to the facts in that case, for there could be no parallel or like circumstances.

The principle underlying the decision in the *Feres* case is difficult to put into words with the preciseness necessary for a legal axiom of general application to the Federal Tort Claims Act.

To what or to whose liability are the facts of a given claim to be parallel or analogous before the United States is liable in tort? The only liabilities to which a parallel can be drawn are those of: (i) the United States, (ii) the several States of our nation, (iii) municipal corporations, or (iv) private individuals. We can think of no others.

(i) Certainly, the parallel cannot be to those liabili-

ties of the United States which existed before enactment of the Federal Tort Claims Act, for there were no such liabilities except those which had been expressly conceded by statute. To require such parallelism would frustrate and defeat the Act and that obviously is not the Congressional intent.

(ii) It cannot be to the liabilities of the several States, for States also have sovereign immunity except as and to the extent that they severally and explicitly may have waived that immunity. To hold otherwise also would defeat the Federal Tort Claims Act.

(iii) It is not the liabilities of municipal corporations to which the parallel may be drawn. In *Indian Towing Company, Inc., v. United States,* this Court explicitly renounced municipal corporation law as determinative or pertinent in testing for liability of the United States under the Federal Tort Claims Act. The court said, 350 U.S. 61, 100 L.Ed. (Advance p. 86) (1955):

> "Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the 'governmental'-'non-governmental' quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an

endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."[5]

We advanced that same argument to the court below both before the *Indian Towing* decision was rendered and again, in our Second Petition for Rehearing, after the *Indian Towing* decision.

(iv) Since the parallel or analogy cannot properly be drawn to liabilities of the United States, the States or municipal corporations, there remains to be considered only the liabilities of private individuals. This leads us directly back to the Federal Tort Claims Act which, in so many words, states that the parallel or analogous liability by which the United States' liability must be tested is the liability of a private individual

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[5] As further evidence of the disharmony and confusion which would result from an extension of municipal corporation law to the Federal Tort Claims Act, we direct attention to the fact that in the State of Washington there are variances in liabilities and immunities of different classes of municipal corporations and political subdivisions. In Washington there is in effect the following statute, Rem. Rev. Stat. §951, RCW 4.08.120:

"§951. *Actions against public corporations.* An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section (county, incorporated town, school district or other public corporation of like character in this state) either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. (L. 69, p. 154, §602; Cd. '81, §662; 2 H.C. §672)."

This statute has been interpreted so that it is now inapplicable to cities, but the waiver of immunity with respect to counties, even in their performance of governmental functions as distinguished from proprietary functions, has been affirmed in *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519 (1921).

under like circumstances in accordance with the law of the place where the act or omission occurred.

Waiving aside the contention that public or governmental activity, as such, has any pertinence in testing for liability under the Tort Claims Act, this Court said in *Indian Towing Company, Inc. v. United States,* 350 U.S. 61, 100 L.Ed. (Advance p. 88) (1955):

> " * * * The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities *in circumstances like unto those in which a private person would be liable* * * *." (Emphasis supplied)

1.02 There Is Analogous Liability for the Negligence in the Case at Bar.

Petitioner's claim is supported by analogous liability, not only of private individuals but of municipal corporations and of the United States itself.

Private individuals would be liable under Washington statutes, under common law, both as a landowner and as a volunteer, and under contract with a third party. For full discussion of liability of private individuals see this brief *infra,* pp. 47-67.

Private individuals are obligated to fight fire originating on or spreading from their lands and are liable for their negligence in failing to fight the fires properly. *Sandberg v. Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200 (1917); *Jordan v. Spokane, Portland & Seattle R. Co.,* 109 Wash. 476, 186 Pac. 875 (1920). To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company,* 91 Wash. 626, 158 Pac. 243

(1916); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919). Such liability attaches even though the fire fighting is done on behalf of the property owner by State fire wardens. *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 (1923); *Wood & Iverson, Inc.. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 (1926).

Private fire fighting companies are liable for their negligence while performing the same functions as a municipal fire department. Such companies do not enjoy immunity even though performing their services pursuant to contract with a municipality. *Voltz v. Orange Volunteer Association*, 118 Conn. 307, 172 Atl. 220 (1934) in which there was negligent driving of a fire truck en route to a fire; and *Doherty v. Oakland Beach Volunteer Fire Company*, 70 R.I. 446, 40 A.2d 737 (1944) in which there was negligent driving of a fire fighting vehicle en route to render rescue services.[6]

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[6] It is appropriate at this point to quote from the Government's brief in the court below. On page 38 of that brief, Government counsel state:

"Translated into the terms of the instant case, appellant's claim is barred because it rests on the asserted failure of the Forest Service to extinguish properly the forest fire, the fighting of forest fires being one of the very duties the Forest Service performs (unlike private persons) for the benefit of the public at large. Had the claim rested on damages suffered as the result of a collision between a Forest Service vehicle engaged in fighting the fire, however, it would not have been so barred. In such circumstances the failure to perform the governmental function of fire suppression would not have been involved. Indeed, from the standpoint of such a claimant, whether the public duty to suppress the fire had been carried out or not would have been of no consequence whatsoever."

We have never been able to understand the processes by which Government counsel reached the conclusion stated in the above quote. Apparently a somewhat parallel argument was made in the *Indian Towing* case because in its opinion this Court states a hypothetical set of circumstances under which a Government employee commits a series of negligent acts, for some of which, under the Government's theory, the United States would be liable and for some it would not. This Court

A municipal corporation was held liable for negligence of its employees in a fire fighting activity in *Workman v. New York City,* 179 U.S. 552 (1900). A fire boat en route to a fire was negligently operated by municipal employees. This Court held that maritime law was applicable and that immunity under municipal corporation law could not be invoked. The case demonstrates that liability of a community for negligence of its firemen is not a novel concept.

Municipal corporations also have been held liable for damages caused by fire which was negligently permitted to spread from their lands. See: *City of Denver v. Porter,* 126 Fed. 288 (8th Cir. 1903) where fire spread from a city refuse dump; *State v. City of Marshfield,* 122 Ore. 323, 259 Pac. 201 (1927) where fire spread from a city park; and *Osborn v. City of Whittier,* 103 Cal. App.2d 609, 230 P.2d 132 (1951) where fire spread from a city garbage dump.[7]

Under similar circumstances Washington municipal corporations have been held to be liable for the negli-

[7] Additional cases from other jurisdictions are: *City of Denver v. Davis,* 37 Colo. 370, 86 Pac. 1027 (1906); *Herrick v. City of Springfield,* 288 Mass. 272, 192 N.E. 626 (1934); *Enterprise Garnetting Co. v. Forcier,* 67 R.I. 336, 23 A.2d 761 (1941); *Peterson v. City of Gibson,* 322 Ill. App. 97, 54 N.E.2d 79 (1944); *Atwater v. City of Toledo,* 163 Ore. 193, 96 P.2d 1081 (1939); *Adams v. City of Toledo,* 163 Ore. 185, 96 P.2d 1078 (1939); *Pittam v. City of Riverside,* 128 Cal. App. 57, 16 P.2d 768 (1932).

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refused to follow the Government's reasoning and stated that it was not the intention of Congress "to draw distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation." In our judgment any member of the Bar would find it difficult to explain to a layman why a fireman, driving in haste (and understandably so) on his way to a fire, could create liability for negligent driving, but when he reaches the fire could stand by and watch the house burn to the ground without making any effort to put it out and would create no liability for the latter event.

gent control of fire. In *Seibly v. Sunnyside,* 178 Wash. 632, 35 P.2d 56 (1934) the City was burning weeds alongside a highway within the city limits during a wind storm. The City took no precaution to warn travelers on the highway and failed to exercise ordinary care to control the fire. The jury held the City liable to the owner of personal property burned when the truck on which it was loaded passed along the highway in the vicinity of the fire.

The issue of municipal immunity was strongly argued in *Babcock v. Seattle School District No. 1,* 168 Wash. 557, 12 P.2d 752 (1932). In order to clear a site preparatory to constructing a school building, the School District contracted to have some old houses burned. The contractor negligently permitted the fire to spread beyond his control, causing the destruction of the plaintiff's nearby residence. The Court held that the facts that a municipal corporation is supported by taxation and devotes its energies to the general welfare are insufficient reasons to immunize it from liability for the negligent control of a fire.

The United States itself was held liable, on a claim arising out of a contract, for damages resulting from fire in a case of considerable significance, *Bloedel Donovan Lumber Mills v. United States,* 74 F. Supp. 470 (Ct. Cl. 1947), certiorari denied, 335 U.S. 814, 93 L.Ed. 369. In that case the plaintiff was awarded damages caused by fire which was set to burn slash at the direction of the same District Ranger Floe who is involved in the case at bar. Almost nine years to the day prior to the fire involved in our case, Ranger Floe insisted that a slash fire be set in this same general

area under very similar weather conditions and in the face of similar wind and weather forecasts. His decision there was in the performance of his job as District Ranger. Certainly if it had been felt that his act was in performance of a governmental function, or if there was no analogous liability, or if this were a novel or unprecedented liability, the court would not have found for the plaintiff. Instead the court said, page 477:

> "Naturally the defendant could not be held liable for ordinary mistakes or errors of judgment. These are inevitable. But viewing all the evidence and circumstances we cannot escape the conclusion that the action of Floe was either arbitrary or negligent and that defendant is responsible for the damages that reasonably could have been foreseen as the natural and probable result of the action taken."

1.03 The "Public Fireman Immunity" Theory Is Not Applicable.

The public fireman immunity statement in *Dalehite v. United States* is based squarely on the no-analogous liability theory. Regardless of the effect which *Indian Towing Company, Inc. v. United States,* and the foregoing analysis may have upon the *Dalehite* statement, the "public firemen immunity" theory is not applicable to the case at bar for several reasons.

1.031 The "Public Fireman Immunity" Theory Is Peculiar to Municipal Corporation Law.

We have not found, and Government counsel have not cited, any cases in which immunity from liability for the negligence of firemen is applied except in suits against municipal corporations. Immunity from liabil-

ity for acts of firemen is a doctrine of municipal corporation law. The reasons why and the circumstances under which municipal corporations have been held immune are summarized by Dillon on Municipal Corporations, Fifth Edition, Vol. IV, p. 2895, §1660, in which that learned author states:

> "The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application."

In *Workman v. New York City,* 179 U.S. 552 (1900), this Court held the City of New York liable under maritime law for the negligent operation of a fireboat, even though acknowledging at the same time that under municipal corporation law the City would be immune. In discussing municipal corporation law, this Court quoted from the lower court as follows:

> "It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest and from which it derives no special benefit or advantage in its corporate capacity,

> are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derived their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties entrusted to them did not relate to the exercise of corporate powers, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the Fire Department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates."

Under the Federal Tort Claims Act it does not matter whether the employee of the government is performing a governmental function or a non-governmental function, nor whether that employee is an elected officer or an appointee. It does not matter whether he is acting for the general welfare of the public or solely for the benefit of his employer, the United States. It does not matter whether or not the United States derives a special benefit from his acts.

The finespun and somewhat artificial theory upon which the historical immunity of municipal corporations from liability for negligence of firemen is based,

as outlined above, is part and parcel of the "governmental-non-governmental" and "sovereign-proprietary" quagmire to which reference was made in the *Indian Towing Company* case and which was specifically renounced by this Court. But if it is suggested that the immunity of municipalities should be carried into the Federal Tort Claims Act, contrary to the obvious intent of the Act, it should follow, as necessary corollaries, that if the reasons for such immunity do not exist, then the immunity does not exist, and that if the facts of the case at bar are analogous or parallel to facts under which even municipal corporations would be liable, then the "public firemen immunity" theory would not apply.

In the case at bar, the Forest Service employees were not firemen. Their employer, the United States, had a direct, private and pecuniary interest in the property which those employees were engaged to care for. The employees were hired, not for the general welfare of the public, but for the special benefit and advantage of their employer. The duties entrusted to those employees relate to the exercise of the Government's proprietary powers and functions.

A fuller discussion of these points follows.

1.032 The Forest Service Employees Were Not Firemen.

District Ranger Floe and his subordinates, of whom complaint is made, were caretakers of the Government lands involved. As such caretakers their duties were many and varied, and included carrying out of forestry practices, selling timber, observation and inspection of road construction and logging operations in timber be-

ing purchased from the United States, checking on hunters, fishermen and recreationists, giving information to the public and to persons interested in the district and its many features and activities, and, in general, acting as caretakers of the Government's land (R. 8). Their duties also required that they inspect and patrol the Government lands and other lands within the Forest Service Protective Area, to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire and when fire occurred within the area, to follow the Fire Suppression Plan previously established and to fight and use every reasonable effort to control and extinguish the fire (R. 9). The Government did not own, maintain or operate a fire department or fire fighting organization as such in this area, but, just as other owners and operators of timber and timberlands in the area, had men and equipment available to fight fires and knew where additional men and equipment to fight fires could readily and quickly be obtained.

When is a public employee a fireman? Were District Ranger Floe and his subordinates public firemen during the forty-day period from August 11 to September 20 when they did practically nothing to extinguish the fire? The fire was contained and controlled within the 1600-acre area of cut-over land where it smoldered during that forty-day period. Within that time the smoldering fire could have been completely extinguished had the Forest Service used sufficient men, equipment and water, all of which were available (R. 22). Instead, and in spite of the large and valuable timber stands imperiled by the smoldering fire, and in spite of dry and

fire hazardous weather conditions the Forest Service simply put the 1600-acre area on a patrol basis with but few men to watch it and had no men present during the night (R. 23). That was wanton and negligent indifference to a potentially dangerous situation, the consequences of which were foreseeable. Were the Forest Service employees acting as firemen during that forty-day period? Is such conduct the act of a public fireman and is it the type of conduct from which the Government should be immune from liability? Did those Forest Service employees have their firemen's hats on during that forty-day period; and whether they did or not, should it make a difference in this case?

The janitor or custodian of any public building or of any state or municipal liquor warehouse, or of a municipal car barn or of any other property owned by his employer should be alert to fire and fire hazardous conditions on the property in his custody. Is he, for that reason, a fireman? If fire breaks out in a waste basket and the custodian grabs the fire extinguisher and puts out the blaze (or fails to put it out) is he yet a fireman? If he stands around and does nothing but watch it burn is he a fireman? Does the fact that a fire extinguisher hangs on the wall make him a fireman or the establishment a fire department? It seems unreasonable to say that a caretaker is a fireman or public fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs.

1.033 The Forest Service Employees Were Engaged in a Proprietary Function of the Government.

The Government derived from the Forest Service employees a special benefit in its proprietary capacity.

The Government lands for which the Forest Service employees were caretakers and on which the fire hazardous conditions and practices complained of existed, were owned and operated by the Government for pecuniary gain and profit and the timber thereon was held, managed, operated and administered upon to be sold to private parties for cutting, for industrial and commercial purposes and for pecuniary gain and profit to the Government (R. 5-6).

1.034 The Forest Service Employees Were Not Charged with a Public Service but Rather to Protect the Interests of Their Employer.

The Forest Service employees were not hired to perform a public service for the general welfare of the whole area or community. They were employed to look after the property of their employer. All of their duties relate to the administration of Government timber alone, and not to the property of others. By statute, 30 Stat. 35, as amended 33 Stat. 628; 16 U.S.C. §551, Appendix A, *infra,* pp. 95-96, the Secretary of Agriculture is authorized to make provision for protection against destruction by fire of public forests and national forests—*i.e., Government timber,*—not private or non-Federal timber. We find no authority for him to provide or maintain firemen for the benefit of the public at large. In administering and protecting Government timber, Forest Service employees best accomplish that

purpose by cooperating with other timber operators in rendering and receiving reciprocal aid and by taking action for the mutual and common benefit. It is as conservator of Government property that the Forest Service undertakes to fight fire on lands other than its own. This is contemplated and authorized by 43 Stat. 653, as amended 43 Stat. 1127, 44 Stat. 242, 61 Stat. 449; 16 USC §565, Appendix A, *infra.* pp. 94, 95. Were it not the Forest Service which undertook to supervise fire fighting in this area it might have been Rayonier Incorporated, the petitioner herein, or some other private timber owner or some association of private timber owners. Such arrangements are authorized by the above statute and by Washington state statutes, Rem. Supp. 1949, §5817-1; RCW 76.04.410 and Rem. Rev. Stat. §5784; RCW 76.04.050, Appendix B, *infra,* pp. 112, 98-9. Private parties sometimes do perform those functions in the States of Washington and Oregon.

The Federal government owns a substantial majority of the timber and timberlands in the Pacific Northwest and a large part of the remainder of the nation's timber. Many of its holdings are adjacent to or checkerboarded with private timber and timberlands. The Forest Service and private timber operators operate in much the same fashion. Their respective employees have many and similar duties, only one of which is to be alert for fire and to act appropriately when fire occurs. Neither the Forest Service nor any private operator maintains or operates a fire department or fire fighting organization as such, but both have some men and equipment available to fight fires and know where additional men and equipment can readily and quickly

be obtained. Both have fire suppression plans designed to mobilize and put into action all necessary forces to combat the common enemy of fire. Fire burns with the same devastation whether it starts on one side of a section line or the other.

When viewed in this light, it is clear that the Forest Service employees were not engaged for the benefit of the public at large, but rather for the special and direct benefit of their employer, the United States. To protect the property of their employer they must fight fire not only on government lands but before it reaches government land. By the same token if the petitioner herein discovered fire on its own or adjacent lands it might well send its own men to fight the fire to prevent it from burning petitioner's timber. In such case petitioner would probably call upon the Forest Service to lend employees and equipment to help fight the fire, just as the Government, in the case at bar, called on petitioner and many others to lend men and equipment to fight these fires.

Municipal fire departments on the other hand, devote their full time to the job and they are maintained to protect any and all property and any and all persons within the municipality. Theirs may properly be characterized as a public service, or a service for the public at large. They are self-sufficient and fully equipped to handle their duties without asking for outside help. In that respect it is not inept to draw a parallel to a public health officer and any quarantine which he might impose on a whole community for the general welfare. But let it be noted here that under the numerous decisions of this and other courts, if that public health officer, as

a Federal employee, should undertake to render specific medical services to a patient and is negligent in performing those services, the Government would be liable. *United States v. Gray,* 199 F.2d 239 (10th Cir. 1952); *Costley v. United States,* 181 F.2d 723 (5th Cir. 1950); *Griggs v. United States,* 178 F.2d 1 (10th Cir. 1949).

1.04 "Public Function" or "General Welfare" Does Not Require Immunity.

The Court below justified its holding, in part, on the ground that "The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics" (R. 83). That position has been overruled by *Indian Towing Company, Inc. v. United States.*

Let us assume, for purpose of argument, that the Forest Service does render fire fighting assistance for the benefit of the public at large or for the general welfare and that its activities are in the nature of a public function. That is no more for the general welfare and no more of a public function than the maintenance and operation of lighthouses by the Coast Guard. Lighthouses are aids to navigation for the benefit of one and all who may be upon the seas and are not there solely or primarily for the benefit of Government vessels.

United States v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955), affirmed by *per curiam* decision, 350 U.S. 907 (1956), on authority of *Indian Towing Company, Inc. v. United States,* holds the United States liable for the negligent operation of an airport control tower by the Civil Aeronautics Administration of the United States. Operation of that control tower was for

the benefit of the public at large and for one and all users of the airfield.

In *United States v. Lawter,* 219 F.2d 559 (5th Cir. 1955) the Court of Appeals for the 5th Circuit held the United States liable for negligence of the Coast Guard in rendering rescue services to a person in a shipwreck. The Coast Guard's activities in rescue operations are certainly for the general welfare and are a public function.

The maintenance and operation of a national army is certainly a public function and for the welfare of the entire nation, yet the United States has repeatedly been held liable under the Federal Tort Claims Act, for negligence of members of the Armed Services while on active duty.[8] The need for exercise of due care by military personnel, even under emergent conditions, is certainly as great as in the activities of a fireman; yet the Government is liable for their negligence.

As a matter of fact the United States Post Office Department in handling the mail is certainly performing a public function and acting for the general welfare, and yet the negligence of the mail truck driver is the classic example cited as an instance for which the United States should be liable. As this Court pointed out in the *Indian Towing Company* case:

> " * * * it is hard to think of any governmental activity on the 'operational level', * * * which is

[8] *United States v. Praylou,* 208 F.2d 291 (4th Cir. 1953) operation of military aircraft; *O'Toole v. United States,* 206 F.2d 912 (3rd Cir. 1953) operation of military combat vehicle; *Smith v. United States,* 116 F. Supp. 801 (D.C. Dela. 1953) and *Air Transport Associates v. United States,* 221 F.2d 467 (9th Cir. 1955), operation of Air Force Bases; *Cerri v. United States,* 80 F.Supp. 831 (D.C. Cal. 1948), shooting of a civilian by an Army guard.

'uniquely governmental' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed."

We can see no reasonable distinction in principle between activities of the kind above described and those of the Forest Service, and there is nothing in the Federal Tort Claims Act which justifies different treatment of negligence of those engaged in one line of work and the negligence of those engaged in another line of work.

For this reason also the old concept of immunity from liability for negligence of public firemen should be discarded as inapplicable under the Federal Tort Claims Act.

1.05 *Dalehite v. United States* Is Distinguishable on the Facts.

Dalehite v. United States is clearly distinguishable on the facts from the case at bar. As we understand the *Dalehite* facts from a reading of the opinions and briefs, the Coast Guard's presence at the scene of the fire was not associated with or for the purpose of protecting Government property, but was for rendition of services for the general welfare. The property and ships involved were not owned by or subject to the control of the Government. The places where the ships were docked and loaded and caught fire were not under the supervision or jurisdiction of the Government. The Coast Guard did not assume and undertake exclusive supervision and control of the fire fighting, nor induce reliance, as did the Forest Service in the case at bar. On the contrary the fire prevention measures and the fire fighting activities complained of were under the supervision, direction and control of the local authorities.

The Coast Guard had no duty to participate, and hence there was no breach of duty which would support an action for negligence.

But had the Coast Guard undertaken to perform specific acts in rendering assistance or in rescuing persons or property, and conducted itself negligently in so doing, then we believe the Government would have been held liable, even as a volunteer, under the reasoning of *Indian Towing Company. Inc. v. United States,* and *United States v. Lawter,* 219 F.2d 559 (5th Cir., 1955) wherein the United States was held liable for rendering rescue services at sea by Coast Guard helicopter and negligently permitting the person being rescued to fall from the rescue line.

PART TWO

Question No. 3

2.00 The United States May Be Liable as a Volunteer.

The Court of Appeals in this case stated:

> "In our opinion the *Dalehite* case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer." (R. 83)

That holding presents Question No. 3 *supra* p. 4 and also enters into Question No. 4.

The Amended Complaint alleges as follows (R. 13, 14):

> "XIV.
>
> "Upon being informed of the fires referred to in paragraph XII, District Ranger Floe and his subordinates immediately assumed, took and exercised exclusive supervision, direction and control of all

activities in connection with the fighting and suppression of the fires, and at all times thereafter, through and including the times referred to in this complaint, continued to and did assume, take and exercise exclusive supervision, direction and control of the fighting and suppression of all fires referred to in this complaint. Plaintiff, in common with other owners and operators of timber and timberlands in the areas referred to in this complaint, knew of the facts described in this paragraph and relied upon District Range Floe and his subordinates to continue to carry on said activities at all times referred to in this complaint."

Regardless of other bases upon which the Government may be liable, it undertook to act and assumed and exercised exclusive supervision, direction and control of the fighting and suppression of all fires referred to in the Complaint and induced reliance by petitioner.

Clearly, the holding of the Court of Appeals in this case that the Government is not subject to the common law obligation of a volunteer, is contrary to the holding of this Court in *Indian Towing Company, Inc. v. United States* and other decisions. In *Indian Towing* this Court, in commenting upon the activity of the Coast Guard in maintaining light houses, said:

> " * * * it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." 350 U.S. 61, 100 L.Ed. Adv. p. 86,

and again

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and en-

> gendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. 61, 100 L.Ed. Adv. p. 89.

The holding of the Court of Appeals in this case was also in direct conflict with the decision of the Court of Appeals for the 5th Circuit in *United States v. Lawter,* 219 F.2d 559 (5th Cir. 1955). During an air-sea rescue operation conducted by the Coast Guard operating a helicopter, plaintiff's wife was drowned because a Coast Guardsman negligently failed to secure her to the lifting cable. Government held liable. The court said, p. 562:

> " * * * For the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy, affirmatively took over the rescue mission, excluding others therefrom, and thus not only placed the deceased in a worse position than when it took charge, but negligently brought about her death, and it is hornbook law that under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken. 38 Am. Jur., 'Negligence,' Sec. 17, p. 659."

For further discussion of the Government's duty as a volunteer, see this brief, *infra,* pp. 62-64.

PART THREE

Question No. 4

3.00 The United States Is Liable Under the Tort Claims Act Because Under the Circumstances of This Case a Private Person Would be Liable Under the Statutes and Under the Common Law of the State of Washington.

3.01 Negligence Defined.

A defendant is negligent when his conduct falls below the standard established by law for the protection of others against unreasonable risk of harm. The elements of the cause of action for negligence are:[9]

(a) A duty to conform to a standard of conduct for the protection of others against unreasonable risks;

(b) Defendant's breach of that duty with respect to plaintiff's interests;

(c) Damage to plaintiff;

(d) Proximately caused by defendant's substandard conduct; and

(e) The absence of contributory negligence.

The question of damage is not at issue here. The question of proximate cause is at issue and is discussed in Part Five, Question No. 6, pp. 5, 6 herein, Contributory negligence is not involved.

Therefore, the following argument is devoted exclu-

[9] *Harvey v. Auto Interurban Co.*, 36 Wn.2d 809, 220 P.2d 890 (1950); *Pate v. General Electric Co.*, 43 Wn.2d 185, 260 P.2d 901 (1953), affirmed 44 Wn.2d 919, 269 P.2d 589 (1954). See also, Prosser on Torts, Hornbook Series, p. 175, §30 Elements of Cause of Action; 2 Restatement of the Law of Torts §§281, 282; 2 Restatement in the Courts, 1954 Supplement §§281, 282; 28 Am. Jur. 651 *et seq.*, Negligence §11 *et seq.*; 65 C.J.S. 325, *et seq.*, Negligence §2 *et seq.*

sively to the question of whether, under Washington law, in the fire hazardous, forested area of the Olympic Peninsula, one landowner has a duty to his neighboring landowners to conform his land and his conduct to the standards of Washington statutes and common law decisions and whether, failing to do so, he is liable to his neighbors for fire damage caused thereby.

Negligence is any conduct which falls below the standard established by law for the protection of others against an unreasonable risk. The standard of conduct that must be observed in order to avoid being negligent is the standard that would be observed by a reasonable man under like circumstances. The standard of conduct of a reasonable man may be established either by legislative enactment or by judicial decision.[10]

3.02 Washington Statutes Establishing Standards of Care.

To appreciate accurately the important bearing of Washington statutes on the issue of negligence, one must take into account that timber is the greatest natural resource of the State of Washington. The forest products industry is pre-eminent on the Olympic Peninsula of western Washington where the events giving rise to this action occurred. Private parties and both the state and federal governments own extensive timber and their respective holdings are intermingled one with the others. A reading of Chapter 76.04 of the Revised Code of Washington (many sections of which are set

[10]Prosser on Torts, p. 264, *et seq.*, §39 Violations of Statute; 2 Restatement of the Law of Torts §§285, 286; 2 Restatement in the Courts, 1954 Supplement §§285, 286; 38 Am. Jur. 827 *et seq.*, Negligence §158 *et seq.*; 65 C.J.S. 413, *et seq.*, Negligence §19 et seq.

forth in Appendix B, pp. 98, 99-113) will make clear the legislature's long-standing and grave concern for the protection of the forests of Washington, especially forests on the Olympic Peninsula, from the risk of fire. Some of these statutes are criminal statutes; others establish standard procedures for cooperation in protecting intermingled private, state and federal timberlands. They prescribe what the legislature of this state regards as the proper standard of care for the conduct of persons and for the condition of land in order to minimize the risk of timber loss through forest fire.

Violation of the standard of care established by statute, either by doing a prohibited act or by failing to do required acts, makes the defendant liable for the invasion of the interests of the plaintiff if: (a) the plaintiff is one of a class of persons whom the statute was intended to protect; (b) the harm which has occurred is of the type which the statute is intended to prevent; and (c) if all of the other elements of tort are present.[11]

Discarger v. City of Seattle, 25 Wn.2d 306, 171 P.2d 205 (1946);

Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 (1950);

Erickson v. Kongsli, 40 Wn.2d 79, 240 P.2d 1209 (1952).

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[11]For a general discussion see: Prosser on Torts, Hornbook Series, §39, p. 264; 2 Restatement of the Law of Torts, §§285, 286; 2 Restatement in the Courts, 1954 Supplement, §§285, 286; 38 Am. Jur. 827, *et seq.*, Negligence §158 *et seq.*; 65 C.J.S. 413, *et seq.*, Negligence §19, *et seq.*; Thayer, Public Wrong and Private Action, 1914, 27 Harv. L. Rev. 317; Lowndes, Civil Liability Created by Criminal Legslation, 1932, 16 Minn. L. Rev. 361.

The Ninth Circuit Court of Appeals has recognized that violation of a fire prevention statute may be the basis for civil liability even though criminal penalties attach to the violation. In *Spokane International Railway Co. v. United States,* 72 F.2d 440 (9th Cir. 1934), the defendant railroad was held liable for damages resulting from fire caused by its passing train. The court said at page 442:

> "(4-6) We come then to the effect of the Idaho statute which required defendant to keep its right of way 'clear and free from all combustible and inflammable material, matter or substances.' during the closed season from June 1st to September 1st. This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another. If the fire originated on defendant's right of way in inflammable material, which in violation of the statute had been allowed to accumulate there, it would be immaterial whether a spark from defendant's engine or the act of a third person from without defendant's right of way had caused the fire. *Curoe v. Spokane & I.E.R. Co.,* 32 Idaho 643, 186 P. 1101, 37 A.L.R. 923 (1920). On the other hand, even though the fire was set by a spark from defendant's engine, if it ignited material lying outside of the right of way, negligence in failing to maintain the right of way in accordance with the statute would be immaterial unless such failure contributed to the spread of the fire."

Violations of statutes intended to protect and preserve Washington timberlands repeatedly have been held proper grounds for civil relief.

In *Kuehn v. Dix,* 42 Wash. 532, 85 Pac. 43 (1906), the court held that a breach of the standard of care established in Rem. Rev. Stat. §5647; RCW 4.24.040 (Appendix B, p. 98) constituted actionable negligence. gence.

In *Wood & Iverson, Inc. v. Northwest Lumber Co.,* 138 Wash. 203, 244 Pac. 712 (1926), the court referred to the following statutes as being evidential of the standard of conduct demanded of people operating timberlands: Rem. Rev. Stat. §5647; RCW 4.24.040 (Appendix B, p. 98), which specifically authorizes civil action for violation of certain forest protection statutes having criminal sanctions; Am. Rem. Supp. 1945 §5792-1; RCW 76.04.230 (Appendix B, p. 113) which establishes procedures for disposing of combustibles on cut-over land and the issuance of certificates of clearance indicating compliance with the standards established by the legislature for the condition of land in forested areas; and Am. Rem. Supp. §5807; RCW 76.04.370 (Appendix B, p. 110) which imposes on landowners the duty to abate fire hazardous combustibles on their lands. The duty and standard of care prescribed by this statute was breached by the Government in the case at bar.

Although the foregoing statutes were referred to in *Wood & Iverson,* the court based its finding of negligence on the ground that defendant had breached the standard of conduct established in Rem. Rev. Stat. §5789; RCW 76.04.180 (Appendix B, p. 99) which establishes a procedure and a standard of care and conduct in situations where slash burning is undertaken. The breach of the said standard justified a reversal of

the trial court and judgment for the plaintiff on the issue of negligence.

In *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927) and in *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19 (1932), the defendant's breach of Rem. Rev. Stat. §5789 was the basis for the court's holding that the defendant's conduct had been substandard and therefore negligent. In the *Mensik* case the court referred also to the standards of conduct set forth in §5807 relied upon by petitioner herein.

Although not all of the statutes referred to in the above cases are ones specially relied upon herein, all are of the same kind, class and nature. The court's reliance on them clearly demonstrates that a breach of the statutory standard of care and conduct constitutes negligence.

The statutes particularly applicable in determining that the Government's conduct was negligent in the case at bar are the following:

Rem. Rev. Stat. §5818; RCW 76.04.450, reads as follows:

> "All forests and timber upon all lands in the state of Washington lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall ex-

pose any of the forests or timber upon such lands to the hazard of fire."

All of the lands described in the complaint (R. 11, 4, 5, 6, 34, 35) and involved in the case at bar are within the fire hazardous Olympic Peninsula area described in that statute.

The Government employees guilty of the negligent conduct complained of were uniquely aware of the unusual fire hazards mentioned in the statute because it includes the area of their activity and for which they had responsibilities under the protective agreement (R. 6-7), and they were aware of the extremely dry condition of said land (R. 10); and of the extremely fire hazardous condition and practices of the railroad on Government-owned land within the area (R. 11-12).

Am. Rem. Supp. §5807; RCW 76.04.370 (Appendix B, p. 110) reads in part as follows:

> "Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. * * * "

The complaint alleges that Government-owned land in the area where the fire started was covered by inflammable debris and that by reason of its condition it was likely to further the spread of fire and thereby endanger the neighboring timberlands and other properties (R. 11, 12, 13, 26).

Rem. Rev. Stat. §2523; RCW 76.04.220 (Appendix B, p. 98) reads as follows:

> "Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor."

The complaint alleges that the Government's employees negligently failed to extinguish the fire that started on Government owned land on August 6, 1951, and that this negligent failure continued for approximately 45 days. During this period there were ample labor, equipment, roads and water available to extinguish the fire but it was permitted to smolder and burn to the great risk of petitioner's timberlands and other properties (R. 12, 14-24).

Am. Rem. Supp. 1945 § 5806; RCW 76.04.380 (Appendix B, p. 108) reads in part as follows:

> "* * * The owner * * * of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; * * * "

The Government had actual and immediate notice (R. 13) of the fire on August 6, 1951, and undertook to act promptly (R. 14). Formal written notice would have been a vain and useless act. The Government con-

tended below that the foregoing statute pertains only to collection by the state from the landowner of the cost of fighting fire. The contention is erroneous. The statute expressly imposes on the owner of land the duty to make every reasonable effort to control and extinguish the fire on his land and to pursue and fight the fire on other lands. That requirement is to protect neighboring lands. The Government breached this standard of conduct (R. 12. 14-24). The statute then imposes financial responsibility on the owner if the state is required to do the owner's work.

3.021 Erroneous Government Contentions re Statutes.

Government counsel, in their argument to the court below, confused petitioner's reliance upon the foregoing statutes with "absolute liability without fault." Petitioner does not contend that the combustible material on the Government land was inherently dangerous or that the Government is absolutely liable without fault by virtue of its breach of the statutes mentioned herein. Petitioner's case is one of liability *with* fault based upon the Government's substandard conduct. There is vital distinction between these two concepts of negligence which is discussed fully as Part Four hereof, covering Question 5, at pp. 73-84, *infra*.

The Government has made three other contentions with respect to statutes which must be anticipated. The first contention is that Rem. Rev. Stat. §5818; RCW 76.04.450, cannot render the Government liable because the violation of this statute requires the person to do an act and that under the pleadings the Government did no act by way of permitting the accumulation of

slash and debris. When Rem. Rev. Stat. §5818; RCW 76.04.450 says " * * * It shall be unlawful for any person * * * to do or commit any act which shall expose any of the forests or timber upon such lands to the hazards of fire.", the phrase "do any act" is plainly synonymous with the phrase "to be guilty of any conduct" and must also include omissions.

The second anticipated contention is that these statutes drastically change the common law, are extremely harsh and are of a criminal nature. The standards of care established by the Washington statutes do not differ materially from the standards of care established by common law. In the following cases landowners were held liable under common law for acts the same as or similar to those described in the complaint:

Prince v. Chehalis Sav. & Loan Assn., 186 Wash. 372, 58 P.2d 290 (1936);

Collins v. George, 102 Va. 509, 46 S.E. 684 (1904);

Riley v. Standard Oil Co. of Indiana, 214 Wis. 15, 252 N.W. 183 (1934);

Eisenkramer v. Eck, 162 Ark. 501, 258 S.W. 368 (1924);

Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346, 118 S.E. 521 (1923).

Moreover, there are specific holdings by the Washington Supreme Court that a number of these statutes are merely declaratory of the common law of this state.

For example, in *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927), it was contended that the standard of conduct prescribed by Rem. Rev. Stat.

§5789, Appendix B, p. 99, requiring certain precautions preparatory to slash burning operations, was unfair and unlawful because it did not harmonize with the common law. The court disposed of the contention as follows at 258 Pac. 328:

> "It is also claimed that this instruction imposed upon appellant an unlimited duty to guard its fires, irrespective of whether or not the spread was due to an intervening cause. But the instruction also charges that the duty is imposed upon appellant to take such care as a careful and prudent man would do. That is the exact requirement of the statute (§5789, *supra*) and therefore cannot be successfully assailed. See, also, *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200."

The *Sandberg* case, cited by the court and quoted at length at pp. 59-60 herein, indicates clearly that under the early English common law the standard of care required to prevent fire escaping from one's own land to neighboring lands was more harsh than it is now under the law of Washington.

Speaking of Rem. Rev. Stat. §5647; RCW 4.24.040, the Supreme Court of Washington on three occasions has said that it is merely declaratory of the general common law tort rule requiring prudence in handling fire in the woods. *Jordan v. Welsh*, 61 Wash. 569, 112 Pac. 656 (1911); *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926). In *Pettigrew v. McCoy-Loggie Timber Co.*, 138 Wash. 619, 245 Pac. 22 (1926), the court said at 245 Pac. 23:

> " * * * we feel satisfied that the provision of Section 3 of the Fire Act of 1877 was purely and

accurately declaratory of a settled principle of the common law * * *."

Thirdly, Government counsel say it would be unreasonable to impose responsibility for the condition of the land in perpetuity. The answer to that is twofold. First, the timber which the statutes are designed to protect is a resource which the legislature wishes to maintain and protect in perpetuity. Second, there are statutory procedures by which a property owner can obtain a certificate of clearance, and thus relieve himself of the responsibility.

3.03 Liability Under Washington Common Law and Decisions.

Under Washington decisions a reasonable District Ranger with Mr. Floe's experience and skill would be required to exercise those qualities of attention, knowledge, skill, intelligence and judgment which society in a timber growing community of western Washington requires of foresters having his special skills and experience. He is required to perceive the conditions, circumstances and activities which have fire significance in the woods and to apply prudent judgment to what he perceives.

3.031 Liability as Landowner.

Under the decisions of the Supreme Court of the State of Washington a land owner, after discovery of fire on his premises, must exercise reasonable care to prevent its spread to adjoining land and he will be liable for damages caused through his failure to exercise such reasonable care. In the case of *Sandberg* v.

Cavanaugh Timber Co., 95 Wash. 556, 164 Pac. 200 (1917), the court used the following language, commencing at 164 Pac. 201:[12]

"The authorities convince us that there may be negligence, such as to render the owner of premises liable to his neighbor in his failure to use due diligence in preventing the spread of a fire originating upon his own land, though it so originate without any act or fault of his own. The common law seems to have rendered an owner of premises on which fire starts, regardless of the manner of its starting, absolutely liable for damage which his neighbor suffers therefrom; but the harshness of this doctrine has been much modified in both England and this country in recent times. In the text in 11 R.C.L. 940, the learned editors state the present-day rule as follows:

"'The general rule in this country, as in England, is now well settled that when a private owner of property sets out fire on his own premises for a lawful purpose, or when a fire accidentally starts thereon, he is not, in the absence of a statute to the contrary, liable for damage caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it.'

"In Bishop's Non-Contract Law, at §833, that learned author says:

"'Since fire, one of the most beneficent servants of man, does not from its own nature im-

[12]To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243 (1916), and *Jordan v. Spokane, Portland & Seattle Railway Company*, 109 Wash. 476, 186 Pac. 875 (1920). See also cases from other jurisdictions which are included in the following annotations: 42 A.L.R. 821, 111 A.L.R. 1149 and 18 A.L.R.2d 1097.

peril surrounding persons and objects, the careful setting and keeping of it in one's dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for the damages.'

"In this test it will be observed that it is at least inferentially stated that there may be negligence rendering an owner of premises liable in such cases, regardless of how the fire starts upon his premises. The reports furnish but few instances of decisions being rendered wherein there is considered the question of the measure of the duty of a person, on whose premises a fire is started by some agency for which he is not responsible, to prevent its spread to his neighbor's property. The decisions touching this exact question, however, seem to be in harmony in holding that there is a measure of responsibility on the part of an owner, growing out of such a situation, which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence."

This statement of common law was confirmed in *Lehman v. Maryott & Spencer Logging Co.,* 108 Wash. 319, 184 Pac. 323 (1919) where the court said at 184 Pac. 324:

"The first question is whether the appellant was negligent in looking after the fire after it had been

> started [on appellant's lands] * * *. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If in this regard he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence.* * * "

In holding for defendant, the court found that there was no negligence.

Walters v. Mason County Logging Company, 139 Wash. 265, 246 Pac. 749 (1926), relied upon by the Government in the District Court, rules in favor of a landowner who exercised ordinary care and was not negligent, the loss being due to an intervening cause not foreseeable or controllable. Contrary to the Government's contentions below, the *Walters* case supports petitioner's theory of duty. The court there said at 246 Pac. 751:

> "In the present case, the origin of the fire was known to be upon respondent's premises. The duty of respondent after notice of the fire burning upon its property was the same as if the fire had been set out by respondent itself. In other words, its duty under the law announced in the *Jordan* case, *supra,* was to use all reasonable efforts to prevent the spread of the fire to the property of others. That is also a statutory duty. Rem. Comp. Stat., §5647 (P.C. §9131-41); *Burnett v. Newcomb,* 126 Wash. 192, 217 Pac. 1017." [RCW 4.24.040.]

One who has a duty to prevent or extinguish a fire

originating on his lands must act as a prudent and careful person would do under like circumstances. In *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company, et al,* 32 Wn.2d 256, 201 P.2d 207 (1948), the Washington Supreme Court, in holding a railroad liable for a clearing fire started on its right of way, said at 201 Pac. 210:

> "The railroads did not have sufficient equipment, nor a sufficient crew, and did not display the proper care and caution in 'handling and controlling such a destructive agency.' Under the circumstances, such lack of care constituted negligence."

See also *Wood & Iverson, Inc., v. Northwest Lumber Company,* 138 Wash. 203, 244 Pac. 712 (1926), confirmed on rehearing, 141 Wash. 534, 252 Pac. 98 (1927).

After the discovery of fire on the Government land on August 6, District Ranger Floe failed to exercise reasonable care to prevent its spread to adjoining lands because, as alleged in the complaint, he failed to use sufficient men and equipment at all stages of the fire (R. 13-15, 17-19, 21-29).

3.032 Liability as Volunteer.

One who volunteers to render services which he should recognize as possibly affecting the safety of another's property is liable in tort if he fails to exercise reasonable care in the performance of the services he undertakes. One whose property may be affected by said services is entitled to assume that the volunteer will perform the services in a reasonably prudent manner. He may rely justifiably upon the volunteer's pru-

dent performance of the services and accordingly may refrain from taking action for his own protection. If the volunteer fails to exercise ordinary care, he will be liable to said property owner.[13]

Clearly, the holding of the Court of Appeals in this case that the Government is not subject to the common law obligations of a volunteer, is contrary to the holding of this court in *Indian Towing Company, Inc., v. United States,* 350 U.S. 61 (1955) and other decisions.[14]

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[13]See 2 Restatement of the Law of Torts, §§497, 321, 323 and 325. See also Prosser on Torts, where that authority, at page 183, states the rule as follows:

"If the defendant's conduct threatens harm, which a reasonable man would foresee, to A, then he is negligent toward A, and by the great weight of authority he is liable for all damage resulting directly to A. even if the damage itself was not to be anticipated."

[14]*Lacey v. United States,* 98 F.Supp. 219 (D.C. Mass. 1951) where the Court said at p. 220: " * * * It is true that, while the common law imposes no duty to rescue, it does impose on the Good Samaritan the duty to act with due care *once he has undertaken rescue operations* * * * " (Italics are the Court's). Judgment was for the United States only because it was held that the Coast Guard had not undertaken the rescue out of which the action arose.

Brewer v. United States, 108 F.Supp. 239 (D.C. Ga. 1952), where the United States was held liable when it undertook construction, maintenance and operation of a civilian swimming pool.

Costley v. United States, 181 F.2d 723 (5th Cir. 1950), and *United States v. Gray,* 199 F.2d 239 (10th Cir. 1952) are two cases where the United States, notwithstanding the fact that it had no duty to care for the patient at all, undertook to treat the patient and, having done so negligently, was held liable for the resultant injuries.

United States v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955) where the Court said at p. 74: " * * * It follows that, when the United States entered the business of operating a civil airport and an air traffic control tower in connection therewith, it assumed a role which might be and was assumed by private interests. Hence under 28 U.S.C. §§1346(b) and 2674, the Government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties * * *." This Court granted certiorari and affirmed the judgment of the Court of Appeals against the United States 350 U.S. 907 (1956), citing *Indian Towing Company, Inc. v. United States,* 350 U.S. 61 (1955).

3.033 Liability Under Contract.

The Government had a duty under its contract with the State of Washington to fight and extinguish this fire.[15] It is immaterial whether petitioner could sue the Government under the contract; the Government's duty to use ordinary care extends to petitioner. 65 C.J.S. 349, relied upon below by the Government, in fact, supports Rayonier's position, as follows:

> " * * * there are two distinct principles which may be invoked to fix liability for an injury from negligence in the performance of a contract obligation. The law may impose duties additional to those specified in a contract or independent of it, and one may owe two distinct duties in respect of the same thing, one of a special character to a particular individual, growing out of special relation to him, and another of a general character to those who would necessarily be exposed to risks or danger or loss through the negligent discharge of such duty. Privity of contract is not necessary where the duty which was breached, although connected with the subject matter of a contract, was not created by contract, as in a case where one who has been employed to perform certain work is guilty of such negligence in connection with the performance thereof as to cause injury to a person other than his employer, or where the thing dealt with is inherently dangerous; a *fortiori,* privity of contract is not necessary where there is no contract relation.
>
> "The governing rule is that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a

[15]Examine paragraph VI of amended complaint (R. 6-7).

manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it, and the nature and extent of the duty assumed by a person are factual matters to be established by proof of his actual conduct; and liability for negligence in the breach of this duty is in no way dependent on the existence of any privity of contract between the person guilty of the negligence, and the person suffering injury as a result thereof."

This rule has been approved by the Ninth Circuit Court of Appeals and by the Supreme Court of the State of Washington. [16]

A private individual could have been party to a contract with the State of Washington similar to the above-mentioned contract to which the Forest Service was a party. Rem. Rev. Stat. §5784; RCW 76.04.050, requires that the State Supervisor of Forestry "shall * * * cooperate in * * * forest fire fighting and patrol * * * with * * * the United States * * * and individuals within the state of Washington * * *." It is under authority of

[16] *Western Auto Supply Agency v. Phelan*, 104 F.2d 85 (9th Cir. 1939); and *Sheridan v. Aetna Casualty, etc., Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940). See also Prosser on Torts, page 206, §33, where it is said:

"*Liability to Third Persons*

"The obligation of a contract runs only to the parties designated by the contract. If the defendant assumes a contract duty toward A, there is no logical basis upon which he may be compelled to perform that duty for B, unless the contract has been entered into expressly for the benefit of B, or A should happen to have assigned his rights. But by entering into the contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation to act in such a way that B will not be injured. The action is not upon the contract, since B is a stranger to it; but the existence of the contract does not negative the responsibility of the defendant when he enters upon a course of conduct which may affect the interest of others."

this statute that the State made the contract with the Forest Service. The Forest Service also is authorized to enter into such contracts, 16 U.S.C. §565.

The Government's duty to observe a proper standard of conduct and to keep its lands in a safe condition was breached in each of the above respects, that is, under the statutes and under common law as a landowner, as a volunteer, and as a contractor upon whom plaintiff was entitled to rely. A breach of any one of those duties would be adequate to support this action. Even if this Court were to hold that any one or more of those duties did not exist, there would still be a claim if any one of them did exist and was breached.

The numerous breaches summarized in the complaint at R. 26-29 include knowingly permitting substandard and fire hazardous conditions and practices on the Government's land, failure to exercise ordinary care in preventing, containing and controlling the fire in each of its preliminary stages and failure to pursue diligently and to extinguish the fire, all with full knowledge of the dangerous conditions and risks involved and having full means at the disposal of the Government's employees to eliminate or minimize the risks. Petitioner was damaged (R. 29-33), and such damage was proximately caused by breach of the Government's duty to petitioner (R. 29).

Clearly, if it were a private person who owned the land and whose employees were guilty of the acts and omissions described in the complaint, that person would be liable to petitioner under the allegations of the complaint and under the law and statutes of the State of Washington. To date, we do not understand Govern-

ment counsel to contend otherwise. The District Judge, especially familiar with the law of Washington where for many years he was a practicing attorney, in his remarks from the bench stated that in his opinion there would be a duty on the Government and a proper claim stated except for the Judge's interpretation of *Dalehite v. United States* (R. 41). In the meantime, *Indian Towing* has supervened to affect the interpretation of *Dalehite*.

PART FOUR

Question No. 5

4.00 Construction of Washington Statutes as Imposing Liability without Fault—Applicability.

The Court of Appeals, in passing upon one important aspect of the case at bar, said at 225 F.2d, 647 (R. 86, 87):

> "Appellant cites RCW §§76.04.370 and 76.04.450, and §§5807 and 5818, Rem. Rev. Stats.[6] These provisions purport to impose liability on a private landowner for failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The *Dalehite* case, 346 U.S. at pages 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions."[17]

[17]The form in which three Washington statutes are set out in footnotes 6 and 8 to the Court of Appeals opinion (R. 86-89) are not the form of those statutes in effect in 1951. The applicable forms are set forth in Appendix B hereto as follows: Am. Rem. Supp. §5807, RCW 76.04.370; Laws of 1951, Ch. 235, §1—Appendix B, p. 110; Rem. Rev. Stat. §5818; R.C.W. 76.04.450; Laws of 1921, Ch. 67, §1—Appendix

That holding was in error and conflicts with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Praylou,* 208 F.2d 291 (1953), Certiorari denied, 347 U.S. 934 (1954). It presents Question No. 5, *supra,* p. 4.

The two Washington statutes involved are as follows: RCW 76.04.370; Am. Rem. Supp. §5807 (Appendix B, p. 110, *infra*) reads, in part:

> "Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. * * * "

It then provides for recovery by the State of any expense in fighting the fire if the party charged by statute with the duty of abating the same, fails to act.

Rem. Rev. Stat. §5818, RCW 76.04.450 reads as follows:

> "All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to

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B, p. 112; Am. Rem. Supp. 1945, §5806; R.C.W. 76.04.380, Laws of 1951, Ch. 58, §9—Appendix B, p. 108.

§5806 in its correct version contains a material difference from the older 1917 form set out in the opinion, in that it imposes a standard of care for "the owner, operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands." The quoted portion was not contained in the older version.

which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents, or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

(All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.)

The Washington Supreme Court has, in effect, held that RCW 76.04.370 does not establish liability without fault. In *State of Washington v. Canyon Lumber Corporation,* 46 Wn.2d 701, 284 P.2d 316 (1955) the court held that statute constitutional. In its discussion the court said of this statute, page 321:

"No one is held responsible under the statute unless they create the hazard, or suffer it to remain upon their property."

In the Fourth Circuit case of *United States v. Praylou, supra,* the Government was held liable under the Federal Tort Claims Act for damages suffered when a Government owned and operated plane fell and exploded on the plaintiff's premises in South Carolina. The South Carolina statute provides in part as follows:

"The owner of every aircraft which is operated over the land or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person

injured or of the owner or bailee of the property injured * * *."

The Government contended that it may not be held liable under that statute because it imposes absolute liability and because under the Tort Claims Act the Government is liable only where there is a negligent or wrongful act or omission of an employee of the Government. The Fourth Circuit Court of Appeals held that the Government is liable under this statute even though absolute liability is created thereby.

The decision of the Court of Appeals in the case at bar and that of the Court of Appeals for the 4th Circuit in the *Praylou* case are obviously in conflict and should be reconciled. In our judgment it is immaterial under the Federal Tort Claims Act whether the statutes of a given state impose liability which is absolute or not because it is the intent and purpose of the act to make the United States amenable to liability in exactly the same fashion and under the same circumstances as private individuals would be liable in the state in which the negligence occurs.

If a statute can validly impose liability upon an individual then it should likewise impose liability upon the Government for the acts of its employees in violation of the statute. In the *Praylou* case the court said:

> "The weakness of the position of the Government is that it overlooks the fact that the effect of the South Carolina statute is to make the infliction of injury or damages by the operation of an airplane of itself a wrongful act giving rise to liability. * * *
>
> " * * *

"It should be noted that the liability asserted here against the government is not one arising out of the mere possession of property, but one created by law for the invasion of personal and property rights. It is clearly within the power of the state to enact legislation imposing such liability, and it is equally clear that any such invasion of rights, whether intentional or not, can be made a wrongful act on the part of the one guilty of the invasion, and is made such by a statute imposing liability therefor. As said in the A.L.I. Restatement of Torts, p. 16, the word 'tortious,' which means wrongful, 'is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require.'
* * *

"* * * *

"It is generally impossible to establish with any certainty the cause of the falling of an airplane. To apply the *res ipsa loquitur* rule, as we did in the *D'Anna* case, *supra,* is, as stated, not very different from applying the rule of absolute liability; and for the law of a state to prescribe the latter instead of the former does not seem to us to remove the case from the liability which the government undertook to assume under the Tort Claims Act. On the contrary, it seems to us that it would be absolutely absurd to hold that the government is liable under the Tort Claims Act for the act of

> an employee who crashes into a house with a truck but not liable if he crashes into it with an airplane, and this on the theory that there is absolute liability under state law in the latter case but not in the former. The man on the street would never understand any such distinction; and in the minds of thoughtful lawyers it would do little credit to the law.* * * "

In the case at bar the liability asserted against the Government is not one arising out of the mere ownership of property but one arising out of the creation or tolerance of a condition and use of that property in such manner as to cause an invasion of the personal and property rights of others, including petitioner. The slash and debris on the land where the fire started was not in itself inherently dangerous. It took something more to make that debris spring into flame and cause the damage complained of. But the Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire would imperil and might spread to the forests in the vicinity; and had the power to prevent both the fire-hazardous conditions and fire-hazardous practices. It is clearly within the power of the state to enact legislation designed to prevent that patently dangerous and negligent situation.

PART FIVE

Question No. 6

5.00 Construction of Amended Complaint

The Court of Appeals has so misconstrued the amended complaint as to call for an exercise of this Court's powers of supervision. Vital questions as to relationships and duties of the parties and of proximate cause hinge on the correct and fair interpretation of the allegations of the amended complaint. Unless the ruling of the Court below is corrected, petitioner's cause will be materially and adversely affected not only on two of the more important matters involved but also on related collateral issues.

5.01 General Rules of Construction

All of the well-pleaded allegations of fact in the amended complaint are deemed admitted by respondent's motion to dismiss.[17] On a motion to dismiss which challenges the sufficiency of the amended complaint to state a claim upon which relief can be granted, the amended complaint must be construed in a light most favorable to plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.[18] We

[17]Rules 12(b) and 56 of the Federal Rules of Civil Procedure. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944); certiorari denied 323 U.S. 719, 89 L.Ed. 578, 65 S.Ct. 48; rehearing denied 323 U.S. 813, 89 L.Ed. 647, 65 S.Ct. 112; rehearing denied 324 U.S. 886, 89 L.Ed. 1435, 65 S.Ct. 682; motion denied 325 U.S. 837, 89 L.Ed. 1963, 65 S.Ct. 1189.

[18]*Meredith v. John Deere Plow Co. of Moline*, 89 F.Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936, 95 L.Ed. 1364, 71 S.Ct. 856. See also *Forstmann Woolen Co. v. Murray Sices Corporation*, 10 F.R.D. 367 at 370, where the District Court for the Southern District of New York said:

"* * * under the Federal Rules a pleading should not be dismissed

submit that the Court of Appeals has not so construed the amended complaint. That Court chose not only to disregard the allegations of the pleading but also to state the facts to be contrary to the allegations.

5.02 Re Ownership and Control of Land on Which the Fire Started

It is patent from the language of its opinion that the Court of Appeals misunderstood the facts concerning title to and control of the railroad right of way and the influence of those facts on this case. The complaint (R. 11) states that the Government "owned, had control of and free and unrestricted access to" both the railroad right of way and the adjoining lands. This is the land which contained an accumulation of fire-hazardous combustibles. This is the land on which the fire started and through which the Government negligently permitted defective railroad equipment to operate in a fire-hazardous manner. This is the land from which the Government negligently permitted the fire to spread to the 1600-acre area. In Washington special responsibilities attach to the ownership and control of land in forested areas. Obviously the extent of the Government's ownership and its right of control of and responsibility for conditions and practices on the land where the fire started, including the right of way over which the defective railroad equipment was operated, are matters of primary importance. The Court of Appeals disregarded the foregoing allegation and unjustifiably assumed facts different than those alleged with respect to

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unless it appears to a certainty that the pleader is entitled to no relief under any state of facts which could be proved in support of the claim."

the ownership and control of the land on which the fire started. Its opinion, 225 F.2d 642 at 646 (R. 85), implies that the Government had only "a right to enter and inspect the right of way" and that such was the limit of its right and title. That is contrary to the complaint.

From the cases cited in 225 F.2d 642, at 646 (R. 84), both in the text and in the footnote, the Court of Appeals apparently adopted the erroneous supposition of the Government's brief with respect to title and possessory rights in the right of way. Contrary to the clear allegation of Government ownership and control, the Court said that "The Government, under the allegations of the complaint, was an adjoining landowner to whose property fire, ignited on the property of a third party, has spread" (R. 85). Based upon such erroneous treatment of the facts the Court discusses and cites authorities applicable only to the rights and duties of the owners of dominant and servient estates as between themselves. Those cases are not pertinent to the case at bar. Regardless of the rights and duties of the Government and the railroad company, *inter sese,* petitioner, as a third party, has been damaged and under the facts pleaded it has a right if it so chooses to hold either or both the dominant and servient owners accountable. On such incorrect treatment of the facts, the Court of Appeals also erroneously rejected the Government's liability and responsibility as one owning and having control of lands in a forest area in the State of Washington.

Moreover, even if one treats the Government as "an adjoining landowner to whose property fire, ignited on the property of a third party, has spread," it does not

follow, as the Court of Appeals suggests, that cases such as *LeRoy Fibre Co. v. Chicago M. & St. P. R. Co.*, 232 U.S. 340 (1914) and those cited in footnote 4 of the Opinion are applicable to the case at bar. Those cases hold there is no contributory negligence by the plaintiff who has failed to conform use of his land to the use of adjoining land and has suffered damage as a consequence. Typically, they are urban, industrial situations where a plaintiff builds a warehouse adjacent to defendant's theretofore established railroad or chemical plant which is a known fire hazard. Granting that in some such cases a landowner is not required to conform the use of his land to that of the adjoining land, the principle invoked in those cases is not applicable to the case at bar. The lands here involved are forest lands, useful for no other purpose. The railroad right of way runs through forest lands. The Washington forestry statutes require that all such lands, including railroad right of way and adjoining lands be cleared of debris because of the fire hazard. The Washington law requires that all such lands conform to standards which will minimize or eliminate fire risk, regardless of the use to which the same may be put. It is to that extent and to that extent only that we insist the Government lands adjoining the right of way must conform. Failure to conform to the standard thus established is negligence.

In discussing the cases on this subject the Opinion (R. 85) acknowledges "There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover

against the party responsible for the fire." The Opinion then cites the Washington case of *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031 (1918) as one of the authorities holding that failing to conform the use of one's land to that of the adjoining land is negligence, but then adopts the opposing line of cases as the Court's ruling, in direct conflict with the applicable Washington case. If there is a division of authority, the case at bar should be controlled by the Washington decisions and not by *Leroy Fibre Co.,* a case with a Minnestoa background.

In discussing this same question, the Opinion declines to follow *Riley v. Standard Oil Co. of Indiana,* 214 Wis. 15, 252 N.W. 183 (1934) the only case cited to the Court which is directly in point, because it is an "extreme" one. Relative to other states, Washington may or may not be extreme in the standards which it is required to impose in order to protect against forest fire hazards. It is sufficient to say they are comparable to the standards sustained in the *Riley* case by the Supreme Court of Wisconsin. Moreover, under the Tort Claims Act, it makes no difference whether the standards are relatively high or relatively low. The plain language of the act, as interpreted by this Court, makes it clear that the Government is required to conform to the same standard of conduct as private individuals under like circumstances according to the place where the act or omission occurred.

On page 646 of the reported opinion (R. 88) the Court observes:

> "* * * To hold an intermediate landowner liable for damage to property caused by fire passing over

his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

This comment is made with respect to a fire which starts on the land of a third party.

The Court's observations here are erroneous for two reasons. In the first place, the fire started on land which "defendant owned, had control of and free and unrestricted access to" (R. 11). It did not start on land of another and then spread across the Government's land. Secondly, the statute, Am. Rem. Supp. 1945 § 5806, R.C.W. § 76.04.380, prescribes a standard of care for "the owner. operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands."

5.03 Re Proximate Cause

Paragraph XXXVI of the amended complaint (R-29) alleges that each of the numerous acts and omissions of negligence described in the amended complaint was a direct and proximate cause of the damage. The acts and omissions of negligence to which reference is made occurred both before the fire started in permitting fire hazardous conditions and practices on Government owned and controlled land, and after the fire started when the Forest Service employees failed to extinguish the fire at three different stages, that is the spot fire stage, the 60 acre stage and the 1,600 acre stage.

The fire which started on August 6, 1951, was caused by sparks thrown from a passenger train, negligently permitted to operate, into improper accumulations of

infilammable material on Government owned and controlled lands. That same fire burned in a natural and continuous sequence thereafter, unbroken by any new or independent cause, and produced the damage to petitioner's property. Without that fire which started August 6, the damage to petitioner's property would not have occurred. Under Washington law those conditions and practices and the fire which started as a result were a proximate cause of the damage. Likewise the negligence of the Forest Service in failing to extinguish the fire immediately during the spot fire stage and again at the 60 acre stage, by failing to use sufficient men, equipment and water, also directly contributed to and were a proximate cause of the damage.

The definition of proximate cause under the law of Washington is the same as elsewhere, namely that cause which in a natural and continuous sequence. unbroken by any new or independent cause, produces the damage complained of and without which the damage would not have occurred.

> *Squires v. McLaughlin,* 44 Wn.2d 43, 265 P. 2d 265 (1953).

Federal Rules of Civil Procedure Rules 8 (e) and (f) provides that pleadings shall be simple, concise and direct; that no technical forms are required, and that all pleadings shall be construed so as to do substantial justice. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then to say "As a result, plaintiff [was injured]". The Court of Appeals does not sug-

gest any deficiency in petitioner's allegation of proximate cause.

In Washington proximate cause is a question of fact, not a question of law, except in rare circumstances, and should be determined by the trier of the facts.

> *McInnis v. Squires,* 136 Wash. 10, 238 Pac. 825 (1925);
>
> *McLeod v. Grant County School District,* 42 Wn.2d 316, 255 P.2d 360 (1953);
>
> *Fleming v. Seattle,* 45 Wn.2d 477, 483, 275 P. 2d 904 (1945);
>
> *Palin v. General Construction Co.,* 47 Wn.2d 246, 287 P.2d 325 (1955).

Notwithstanding the allegations of the amended complaint and in spite of the rules of construction and the law above referred to, the Court of Appeals, in obscure and confusing language, said, 225 F.2d at page 644 (R. 81):

> " * * * In our opinion it was this *recurrence* of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks. if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * * " (Emphasis added)

Why was such "recurrence" of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract.

It would have not reached the 1600-acre tract nor ever have started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment of the fire, terminate and what caused them to terminate? The Opinion does not explain. Does the Court below intend to imply that when one responsible for the start of a fire has it contained and under control his duty has ended or that the risk of fire has thereby terminated? If so, that is contrary to Washington law.

The Washington statutes establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Halfway measures are no more tolerated by Washington forestry laws.

Does the above quote from the Opinion imply that there was an intervening force or superseding cause which ended the force of the original cause? The Opinion does not explain, although the authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforseeable intervening force and superseding cause. They are not applicable to the facts in the case at bar because the amended complaint here specifically alleges that everything contributing to the September breakaway fire was foreseeable and could have been guarded

against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government owned and controlled right of way and adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The Opinion quotes paragraph XXXII of the Complaint, which describes the Forest Service doing nothing, and then simply says, page 644 (R. 81):

> "On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract."

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner or volunteer, it will be held accountable, but if it is negligent twice, once as a landowner or as a volunteer and later as a public fireman, it will not be liable at all.

In other words the Court of Appeals concluded that, so far as the Government is concerned, nothing that existed or occurred prior to August 11 is material and cannot be a proximate cause of the damage. That conclusion is possible only through a gross misunderstanding of the amended complaint and an erroneous interpretation of the law. According to the Court of Appeals, even if it be granted that a private party under like circumstances could be negligent and liable, the acts and omissions alleged herein, though negligent, having been those of Forest Service employees are superseded as a proximate cause by the intervening act of those same

Forest Service employees putting on their fireman's hats and thereafter proceeding negligently in their immune status as public firemen. Those ratiocinations are not compatible with the rules established by this and other courts that the complaint be construed in the light most favorable to plaintiff and so as to do substantial justice.

If, as the Court of Appeals' opinion implies, there are questions of unforeseeable intervening force, superseding cause or termination of risk, those are matters of defense which the Government can raise when it pleads further and are questions of fact on which petitioner is entitled to be heard. There is nothing in the record justifying those questions at this time nor justifying a dismissal of the complaint on those grounds. The District Court held that but for *Dalehite* he would have denied the Government's motion to dismiss and would have found that the complaint sufficiently alleges a claim for which relief can be granted (R. 41). A fair reading of the complaint makes it unmistakable that the fire-hazardous conditions and practices on Government owned and controlled property, negligently permitted by Government employees, effectively contributed to, and made possible and were the proximate cause of the fire which started August 6. Likewise, the fire which started on government owned and controlled land on August 6 burned continuously thereafter and did the damage complained of. The fire burned in a natural and continuous sequence unbroken by any new, independent cause and produced the damage to petitioner's property. Without that fire which started August 6, the damage to petitioner's property would

not have occurred. No construction or interpretation of the complaint is necessary in order to draw the foregoing facts from it.

From the foregoing discussion of the opinion of the Court below, it is obvious that the Court of Appeals has misconstrued the clear allegations of the complaint; has drawn inferences of fact which not only are unwarranted but contrary to the allegations of the complaint; has misconstrued the relationships between the Government and petitioner; has compounded error upon error, and has so confused the record as to call for the exercise by this Court of its powers of supervision.

Whether this Court does or does not reverse the courts below on the basic question of immunity of the Government from liability for acts of public firemen—and we believe it will, it is of primary importance that this Court correct the gross error of the Court of Appeals in its misconstruction of the amended complaint. Not only has the Court of Appeals greatly prejudiced petitioner, but we earnestly believe the opinion to be bad law which should not be permitted to stand with the precedental authority attaching to a case which is reviewed by the Supreme Court of the United States.

SUMMATION

The United States Government is big and its activities include or directly affect the conduct of almost every type of business and industry. Government employees have jobs and duties and functions identical to those of employees of private concerns and they make the same mistakes and cause like injury. It was in this climate of participation by Government that the Federal Tort Claims Act evolved. There was and is a definite need for it by every legal, political, economic, social and just standard of this country. No citizen should be left without redress for a wrong done to him simply because of the fortuitous circumstance that the trespasser is a public, rather than a private, servant. If one's toe is stepped on, it hurts just as much whether the trespasser draws his pay check from the Government or from a private employer. Fire burns with the same devastation whether it starts on one side of a section line or the other.

Recognizing the unfairness to citizens who are left without recourse for damage caused by Government employees, Congress passed the Tort Claims Act, thereby intending to put the Government on a parity with its citizens.

In the case at bar the Government owns land and timber which it manages and operates for profit, just as do petitioner and other private parties in the area. It has employees to look after that timber just as do private owners, and its employees go about their work doing the same chores and having the same opportunities for doing a good, bad or indifferent job as do em-

ployees of private owners. Government timber and private timber are intermingled and what is good or bad for one timber owner is equally good or bad for the other timber owners in the area.

Timber is a major, but limited, resource, the preservation and perpetuation of which is a matter of concern both to private industry and to public agencies. For its own selfish economic well-being, private industry must assure itself of continued existence by safeguarding and harvesting in an orderly manner the timber which it controls. The citizens of this state, who are a part of the industry, have imposed on themselves, through the state legislature, standards of care and conduct to which they must conform for the general and particular welfare of all persons. Those standards of care are not materially different from the standards established through the exercise of sound and prudent judgment which is reflected in the common law. If to a stranger those standards seem high or harsh, such reaction can be ascribed to a lack of understanding and appreciation of the practical methods of raising, managing and harvesting the timber crop consistent with the observance of precautions and protections against fire hazards. It is self-evident that the standards prescribed by Washington statutes are not unduly high or harsh, because those standards are self-imposed and because the timber industry has operated successfully under them, with only minor variations, for more than seventy years.

Neither can it be argued in derogation of those statutes that they are any less pertinent in civil cases just because criminal penalties attach to their violation, or

because the offending party may by statute be made liable to reimburse the state if the latter is compelled to take the action which the responsible party should have taken in abating hazardous conditions or suppressing fires.

The United States owns a substantial majority of the timber and timber growing lands in the Pacific Northwest. For the economic well-being of the country, it must make much of that timber available to private industry in order that the whole nation may enjoy the fruits of this resource. It follows with at least equal validity and importance that Government lands in forest areas, and the conduct of federal employees in the pursuit of their work, should properly and in fairness conform to the same standards as private individuals for the protection of all timber, public as well as private.

The Fire Suppression plan which the Forest Service adopted, and which is described in the amended complaint (R. 16-17), was similar to that which most private owners established for themselves, for private owners recognize the primary responsibilities which attach to them as owners, and the losses which they and others will sustain if fire occurs on their property. All such plans recognize the inadequacy of the men and equipment of just one party to cope with a major fire and they contemplate the cooperation of neighbors to furnish men and equipment to fight the common enemy. That practice is common in the industry, and Government in this case is a part of that industry.

Whether it was a matter of expediency or policy, it

so happens that the Forest Service committed itself to take charge in case of fire in this area. If the Forest Service had not done so, it could have been the petitioner herein or some other company or an association of private timber owners which undertook that responsibility, as both state and federal agencies are authorized by statute to make such arrangements with private parties to set up fire protection procedures. 16 U.S.C. §565; Rem. Rev. Stat. §5784; RCW 76.04.050. When the Forest Service decided to undertake this leadership and when it did in fact assume exclusive supervision and control of the fire-fighting activities, and induced reliance by petitioner and others upon the Forest Service performance of that job, the District Ranger and his subordinates were obligated to do their work prudently and with due care under the circumstances. It does not matter whether one judges the status of the Forest Service employees as agents of a landowner, as agents of one who has contracted to assume this leadership, or as volunteers. The Government's duties and obligations stem from each such status. The fact remains that the Forest Service employees did act and were bound to exercise due care; and that by failing to exercise due care they were negligently responsible for the losses which ensued.

We have repeatedly put to Government counsel, and they have just as repeatedly ignored, the following question, the answer to which, in our judgment, is determinative of this case:

> "Let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier,

the petitioner herein, was the defendant, and that the conditions, acts and omissions described in the amended complaint were those created, tolerated or committed by petitioner and its employees. Is there any reason in fact or in law why the positions of the parties could not be transposed in all material respects and, in such example, would petitioner be liable to the United States?"

To us this case should be a clear one in which petitioner is holding its neighbor responsible and accountable for failing to conduct itself in the same manner as the neighbor expects petitioner to act, and in which the neighbor would look to petitioner for redress were the situations reversed.

CONCLUSION

We respectfully suggest that the District Court and the Court of Appeals erred in dismissing the amended complaint and ask this Honorable Court to reverse the order and judgment herein reviewed and that, in doing so, this Court, among other things, make clear that the standards to which Government employees must conform and the responsibilities of the United States as a timber and land owner and operator are the same as those required of the citizens of the State of Washington.

Respectfully submitted,

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APPENDIX A

FEDERAL STATUTES INVOLVED

Federal Tort Claims Act
28 U.S.C. §1346

§1346. *United States as Defendant*

"(a) * * *

"(1) * * *

"(2) * * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"(c) * * *

"(d) * * *

"(1) * * *

"(2) * * *

"June 25, 1948, c. 646, 62 Stat. 933, amended Apr. 25, 1949, c. 92, §2(a), 63 Stat. 62; May 24, 1949, c. 139, §80 (a, b), 63 Stat. 101."

28 U.S.C. §2671

"§2671. *Definitions*

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

" 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

" 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

" 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106."

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28 U.S.C. §2674

"§2674. *Liability of United States*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

" * * * June 25, 1948, c. 646, 62 Stat. 983."

28 U.S.C. §2680

"§2680. *Exceptions*

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

"(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

"(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

"(h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043."

Statute Authorizing Cooperative Forest Protection Contracts

16 U.S.C. §565

"§565. *Cooperation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States*

"If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to cooperate with appropriate officials of each State, and through them with private and other agen-

cies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the cooperative work for the State, that State and private expenditures as provided for in this section have been made. In the cooperation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such cooperation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the cooperative States. As amended July 25, 1947, c. 32 §1, 61 Stat. 449."

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16 U.S.C., §551

"§551. *Protection of national forests; rules and regulations.* The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471

of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished as is provided for in section 104 of Title 18. June 4, 1897, c. 2, §1, 30 Stat. 35; Feb. 1, 1905, c. 288, §1, 33 Stat. 628."

APPENDIX B

WASHINGTON STATUTES INVOLVED

Laws of 1869, p. 154, §601; Rem. Rev. Stat. §950; RCW 4.08.110:

"An action at law my be maintained by any county, incorporated town, school district or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character and not otherwise, in any of the following cases:

(1) Upon a contract made with such public corporation;

(2) Upon a liability prescribed by law in favor of such public corporation;

(3) To recover a penalty or forfeiture given to such public corporation;

(4) To recover damages for an injury to the corporate rights or property of such public corporation."

(This statute subsequently was amended by Laws of 1953, Ch. 118, §1.)

Laws of 1869, p. 154, §632; Rem. Rev. Stat. §951; RCW 4.08.120:

"An action may be maintained against a county or other of the public corporations mentioned or described in preceding section, either upon a contract made by such county or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public

corporation." (This statute subsequently was amended by Laws of 1953, Ch. 118, §2.)

Laws of 1909, Ch. 249, §271; Rem. Rev. Stat. §2523; RCW 76.04.220:

"§271. *Negligent Fires*

"Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor."

Laws of 1877, p. 300, §3; Rem. Rev. Stat. §5647; RCW 4.24.040:

"If any person shall for any lawful purpose kindle a fire upon his own land he shall do it at such time and in such manner and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fail so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage."

Laws of 1877, p. 300, §; Rem. Rev. Stat. §5648; RCW 4.24.050:

"Persons engaged in driving lumber upon any waters or streams of this Territory, may kindle fires when necessary for the purposes in which they are engaged, but shall be bound to use the utmost caution to prevent the same from spreading and doing damage; and if

they fail so to do, they shall be subject to all liabilities and penalties of this act, in the same manner as if the privilege granted by this action had not been allowed."

Laws of 1877, p. 301, §6; Rem. Rev. Stat. §5649; RCW 4.24.060:

"The common law right to an action for damages done by fires, is not taken away or diminished by this act, but it may be pursued, notwithstanding the fines or penalties set forth in the first and second sections of this act; but any person availing himself of the provisions of the third section [shall] be barred of his action at common law for the damages so sued for, and no action shall be brought at common law for kindling fires in the manner described in the fifth section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained."

Laws of 1929, Ch. 207, §3; Rem. Rev. Stat. §5789; RCW 76.04.180:

"No one shtll burn any forest material or the waste or debris resulting from logging or land clearing operations until such work shall have been done in and around the slashing or chopping and/or the area proposed to be burned over to prevent the spread of fire therefrom as shall be required to be done by the state supervisor of forestry, or any warden or ranger. The said supervisor or any warden or ranger may require

the cutting of such dry snags, stumps and dead trees within the area to be burned, which in his judgment constitute a menace or are likely to further the spread of fire therefrom.

"When any person shall have obtained permission from the said supervisor, warden or ranger, to burn any slashings made for the purpose of clearing land, the warden may, at his discretion, furnish him with a man to supervise and control the burning, who shall represent and act for such warden, and shall have all the power and authority of a warden while engaged in such service, including the right to revoke such permit, if in his opinion the burning authorized would endanger any valuable timber or other property. Such a man shall serve only until such time as the party burning may be able to keep the fire under control himself.

"The said supervisor and wardens are hereby authorized and empowered to employ a sufficient number of men to extinguish or prevent the spreading of any fires that may be in danger of destroying any valuable timber or other property of the state. The said supervisor, or any warden by special authority of the said supervisor, may provide needed tools and supplies, and transportation when necessary for men so employed.

"Every man so employed, and also the representative of the warden supervising the burning, shall be entitled to compensation at a rate to be fixed by the director of the department of conservation and development, and the warden shall issue a certificate to each man so employed showing the number of hours worked by him and the amounts due to him, upon which, after

approval by said supervisor, the men shall be entitled to receive payment from the state in the manner provided for in section 5783.

"Any person refusing to render assistance when called upon by any warden, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00)."

Laws of 1951, Ch. 58, §4; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.250:

"§4. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

"(1) Any woods operation or mill using spark-emitting or electric engines unless provided with the following fire tools, or the serviceable equivalent thereof, at each landing, and/or yarding tree or mill:

"(a) For operations employing more than five men:

"To be kept in a sealed tool box: Three axes, six shovels and six adze hoes;

"To be kept adjacent to the tool box: Two bucking saws with handles, and one five-gallon pump can filled with water.

"(b) For operations employing five men or less:

"To be kept in a sealed tool box: Two axes, three shovels, and three adze hoes;

"To be kept adjacent to the tool box: One bucking saw with handles, one hundred gallons of water and two buckets.

"(2) Any gasoline, diesel, or electric yarding, skidding, or loading engine unless:

"(a) Equipped with two chemical fire extinguishers of not less than one and one-half quart capacity;

"(b) Exhaust is turned up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor:

"(3) Any tractor unless:

"(a) Equipped with one chemical fire extinguisher of not less than one quart capacity;

"(b) It has exhaust turned up perpendicular or is equipped with an adequate spark arrestor.

"(4) Any truck hauling forest products from any forest area unless:

"(a) Equipped with a chemical fire extinguisher of at least one quart capacity;

"(b) Equipped with one axe;

"(c) Equipped with one shovel;

"(d) Exhaust is turned up perpendicular or equipped with adequate spark arrestor or muffler.

"(5) Any portable power saw unless the power saw operators keep in their immediate possession, a chemical fire extinguisher of at least eight ounce capacity, or a serviceable shovel.

"(6) Any gasoline or diesel engine used in a mill or for uses not specifically mentioned above unless:

"(a) Equipped with chemical fire extinguisher of at least one quart capacity;

"(b) Exhaust is pointed up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor;

"(c) One hundred gallons of water and two buckets."

Laws of 1951, Ch. 58, §5; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.260:

"§5. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

"(1) Any spark-emitting railroad logging locomotive unless:

"(a) Equipped with a safe and suitable device for arresting sparks;

"(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures not less than forty pounds per square inch;

"(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle;

"(d) Equipped with all the complement of hand tools listed under section 1(a) of section 76.04.250, kept in a sealed tool box on such locomotive ready for instant use;

"(e) Equipped with a sprinkler system which can be capable of wetting the tracks and at least two feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply;

"(f) During the closed season it is followed by a speeder or other patrol. Such patrol shall be equipped with two shovels, one axe, and one five-gallon pump can filled with water. When a logging train operates on a common carrier track the patrol will be regulated under laws pertaining to common carrier railroads.

"(2) Any common carrier railroad trains operating through forest lands unless:

"(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, each patrol to be equipped with a five-gallon fire extinguisher, two shovels and one axe. In case a railroad company fails to provide patrol as required, the supervisor is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be collected in a civil suit brought by the state against said railroad company;

"(b) At the request of the supervisor, such common carrier maintain pumping equipment and fire fighting tools specified by the supervisor but not to exceed those required of logging locomotives.

"(3) Any steam logging engine or boiler unless:

"(a) Being equipped with and using a safe and suitable device for arresting sparks:

"(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute a pressures of not less than forty pounds per square inch;

"(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle.

"(4) Any railroad locomotive, logging locomotive, logging or other engine or boiler unless equipped with an adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor."

Laws of 1951, Ch. 58, §6; Am. Rem. Supp. 1941, §5794 (part); RCW 76.04.270:

"§6. Every person violating the provisions of sections 76.04.250 and 76.04.260 shall upon conviction be punished by a fine of not less than twenty-five dollars nor more than seventy-five dollars and the judgment of the court, in case of conviction, shall prohibit such person from operating a train, railroad locomotive, logging locomotive, or other engine, power equipment or boiler until the requirements of such sections have been complied with."

Laws of 1911, Ch. 125, §15; Rem. Rev. Stat. §5795; RCW 76.04.280:

"No one operating a railroad shall permit to be

deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right-of-way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

"Any one violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars ($25.00), nor more than one hundred dollars ($100.00) or be imprisoned in the county jail not exceeding thirty (30) days.

"Wardens and rangers shall report any lack of sufficient spark-arresters, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offense."

Laws of 1923, Ch. 184, §7; Rem. Rev. Stat. §5795-1; RCW 76.04.290:

"Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right-of-way or route, to the local fire warden or to the office of the state supervisor of forestry."

Laws of 1917, Ch. 33, §3; Rem. Rev. Stat. §5796; RCW 76.04.310:

"Everyone clearing right-of-way for railroad, pub-

lic highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right-of-way, shall pile and burn on such right-of-way all refuse timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right-of-way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state shall be observed in all clearings of right-of-way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section."

Laws of 1923, Ch. 184, §9; Rem. Rev. Stat. §5803; RCW 76.04.340:

"Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be

communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars ($1,000.00) or imprisonment not exceeding one year, or by both such fine and imprisonment."

Laws of 1941, Ch. 168, §2; Rem. Supp. 1941, §5804; RCW 76.04.350:

"Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board; *Provided,* That for the purposes of this section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties."

Laws of 1951, Ch. 58, §9; Am. Rem. Supp. 1945, §5806; RCW 76.04.380:

"Any fire on any forest land burning uncontrolled and without proper action being taken to prevent

its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

"The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under the laws pertaining to slash responsibility.

"When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and

such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor or his authorized deputies."

Laws of 1951, Ch. 235, §1; Am. Rem. Supp. §5807; RCW 76.04.370:

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

"If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land

enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence."

Laws of 1917, Ch. 105, §5; Rem. Rev. Stat. §5808; RCW 76.04.400:

"When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be approved and paid in the manner prescribed for claims outside such co-operative districts."

Laws of 1949, Ch. 141, §1; Rem. Supp. 1949 §5817-1; RCW 76.04.410:

"The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state."

Laws of 1921, Ch. 67, §1; Rem. Rev. Stat. §5818; RCW 76.04.450:

"All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

[All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.]

Laws of 1911, Ch. 125, §4, part; Rem. Rev. Stat. §5784, part; RCW 76.04.050, part:

"The supervisor, subject to the approval of the direc-

tor, may appoint trained forest assistants, possessing technical qualifications, and may employ necessary clerical assistants, and fix the amount of their salaries. which shall be payable monthly.

"He shall, under the supervision of the director, whenever he deems it necessary to the best interests of the state, co-operate in forest surveys, forest studies, forest products studies, forest fire fighting and patrol, and the preparation of plans for the protection, management, replacement of trees, wood lots, and timber tracts, with other states, the United States, the Dominion of Canada, or any province thereof, and with counties, cities, corporations, and inviduals within this state. * * * "

* * * "

" * * * ."

Laws of 1951, Ch. 58, §3; Am. Rem. Supp. 1945 §5792-1; RCW 76.04.230:

"When any fire hazard exists, or has been created by any logging or clearing operations, and whether the supervisor has declared the same to be a fire hazard or not, and whether or not an effort has been made to remove or abate such fire hazard, an application may be made to the supervisor for a certificate of clearance.

"As soon as practicable after the receipt of such written request the supervisor shall cause the area to be carefully inspected and if it is found that the unused material and debris has been properly disposed of or the fire hazard abated, through deterioration or utilization, the supervisor shall issue a certificate of clearance in duplicate, one copy to be delivered to the applicant

and one copy to be retained in the records of his office. Each such certificate of clearance shall describe with reasonable accuracy the slashing, chopping or other area on which the unused material or other debris or fire hazard has been satisfactorily disposed of or the fire hazard abated through deterioration or utilization, by subdivision, section, township, and range, shall give the approximate acreage of the area to which the certificate applies, shall name the person who created such slashing, chopping, unused material, or fire hazard, if known, and name the person by whom the disposal or abatement was done, shall give the date on which the area was inspected and the name of the person making the inspection, and shall certify that in the opinion of the inspector such unused forest material or debris has been properly disposed of or through deterioration or utilization the fire hazard abated. Such certificate of clearance shall be issued for any fraction or part of the area inspected when the inspector finds that only such fraction or part meets the requirements of satisfactory and legal disposition of such unused material or debris and of the abatement of such fire hazard.

"Whenever the supervisor determines that the burning of any area will result in the destruction of second growth or will be detrimental to the growth of a new forest crop, or that burning such area will create a greater fire hazard than already exists, he may issue a certificate of clearance therefor: *Provided*, That the owner and/or operator will still be responsible for the costs of fire fighting made necessary by said fire hazard and the supervisor will have the right to require extra protection to be given the area by the owner and/or

operator if the hazard warrants it: *Provided further,* That should owner elect not to continue to be responsible for fire fighting costs, he may in lieu thereof request the supervisor to be relieved of this responsibility and if agreeable with the supervisor, contract to pay to the division of forestry, or an organized forest protection agency approved by the supervisor a sum to be fixed by the supervisor.

"All certificates of clearance shall be conclusive evidence of the satisfactory and legal disposition and abatement of the unused material and debris and the fire hazard created thereby to the extent in such certificate set forth; but any such certificate may be cancelled or set aside, upon due notice served in writing by the supervisor for fraud or collusion in the procuring or issuance thereof, or in the event of non-compliance with any provision or condition therein."